PROCEEDINGS AND ORDERS DATE: [05/19/94]

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SHORT TITLE: [Hoffman, Ian]
VERSUS [Harris, Tammy, et al.] DATE DOCKETED: [122093]
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	DATE	NOTE	PROCEEDINGS & ORDERS
1	Dec 20 1993	D	Petition for writ of certiorari filed.
3	Jan 12 1994		Order extending time to file response to petition until March 1, 1994.
5	Mar 1 1994	X	Brief of respondents Tammy Harris, et al. in opposition filed.
9	Mar 2 1994		DISTRIBUTED. March 18, 1994, pg. 15.
8	Mar 23 1994		REDISTRIBUTED. April 15, 1994 (Page 27)
10	Apr 11 1994		REDISTRIBUTED. April 15, 1994 (Page 29)
12	Apr 25 1994		Petition DENIED. Dissenting opinion by Justice Thomas with whom Justice Scalia joins. (Detached opinion.)

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1pp

NO. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

IAN HOFFMAN — PETITIONER

v.

TAMMY D. HARRIS, INDIVIDUALLY;
COLLEEN WEST, INDIVIDUALLY;
MELISA HOFFMAN, INDIVIDUALLY;
COMMONWEALTH OF KENTUCKY
CABINET FOR HUMAN RESOURCES — RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM C. JACOBS
Petitioner's Counsel of Record
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2464

84 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the 11th Amendment a bar to a federal court §1983 action for prospective injunctive relief because the complaint named the state agency as the §1983 defendant rather than naming an official of that agency in his or her official capacity?

2. Is a private citizen, answerable under 42 U.S.C. §1983, as acting under color of state law when she acted together with or obtained significant aid from two state social workers to deprive the §1983 plaintiff of his constitutionally protected liberty interest in the physical custody of his child by invoking a statute, challenged by the §1983 plaintiff as being procedurally defective under the Due Process Clause under principles in this Court's opinion of *Zinermon v. Burch*?

3. Where a §1983 Plaintiff claims that a §1983 defendant/private citizen acted together with and obtained significant aid from two co-defendant/state social workers to invoke a statute, challenged by the Plaintiff as being unconstitutional, must the court decide whether the statute is constitutional before it can adjudge whether the private citizen is a state actor for purposes of §1983?

4. Is the Due Process Clause offended by a state statute that, without regard to whether a pre-deprivation hearing is feasible, authorizes a court to issue an *ex parte* order to deprive a parent of his constitutionally protected liberty interest in the physical custody of his child?

5. Do state social workers, sued in their individual capacities, enjoy absolute prosecutorial immunity from answering in §1983 damages for seeking and obtaining an *ex parte* court order that deprived the §1983 plaintiff of his 14th Amendment protected liberty interest in the physical custody of his child?

QUESTIONS PRESENTED FOR REVIEW (continued)

6. If state social workers, sued in their individual capacities, enjoy absolute prosecutorial immunity from answering in §1983 damages for seeking and obtaining an *ex parte* court order that deprived the §1983 plaintiff of his 14th Amendment protected liberty interest in the physical custody of his child, is that absolute prosecutorial immunity lost either because the social workers are statutorily restricted to performing investigatory functions only, or because they knew or should have known that jurisdiction over child custody lay with a court other than the court where they sought and obtained the *ex parte* order?

PARTIES

The caption of the case in this Court contains the names of all parties.

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OPINIONS BELOW

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The Opinion of the U. S. District Court for the Eastern District of Kentucky at Lexington, No. 91-526, dismissing the counterclaim of Respondent, Hoffman, entered February 5, 1992, is unreported. (Appx. 37a-42a).

The Opinion of the U. S. District Court for the Eastern District of Kentucky at Lexington, No. 91-526, granting, *inter alia*, summary judgment to Respondents, entered June 25, 1992, is unreported. (Appx. 14a-35a).

The Opinion of the U. S. District Court for the Eastern District of Kentucky at Lexington, No. 91-526, denying Petitioner's Rule 56 motion, entered August 19, 1992, is unreported. (Appx. 10a-12a).

JURISDICTION

The U.S. Court of Appeals for the Sixth Circuit issued its opinion on September 21, 1993. This Petition is filed within 90 days after the entry of the Judgment of the Court of Appeals on September 21, 1993.

The jurisdiction of this Court to review the opinion and judgment of the is U.S. Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

U. S. CONSTITUTIONAL PROVISIONS INVOLVED

ELEVENTH AMENDMENT

Suits against states; Restriction of judicial powers. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State.

FOURTEENTH AMENDMENT

Section 1. ... nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

FEDERAL STATUTE INVOLVED

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATE STATUTES INVOLVED

KRS 610.010(1)

(1) Unless otherwise exempted by KRS Chapters 600 to 645, the juvenile session of the district court of each county shall have exclusive jurisdiction in proceedings concerning any child living or found within the county who has not reached his eighteenth birthday . . . .

KRS 610.010(6)

(6) Nothing in this chapter shall deprive other courts of the jurisdiction . . . to determine the custody . . . of children when such custody . . . is incidental to the determination of other causes pending in such other courts . . . .This section shall not work to deprive the circuit court of jurisdiction over cases filed in the circuit court.

KRS 620.040(1)

Duties of prosecutor, police, and cabinet -- Prohibition as to school personnel -- Multidisciplinary teams.-- (1) Upon receipt of a report alleging abuse or neglect by a parent, guardian, or person exercising custodial control or supervision, pursuant to KRS 620.030(1) or (2), the recipient of the report shall forthwith notify the cabinet or its designated representative, the local law enforcement agency or Kentucky State Police, and the Commonwealth's or county attorney of the receipt of the report. The cabinet shall investigate the matter immediately and within forty-eight (48) hours, exclusive of weekends and holidays, make a written report to the Commonwealth's or county attorney and the local enforcement agency or Kentucky State Police concerning the action which has been taken on the matter. If the report alleges abuse or neglect by someone other than a parent, guardian, or person exercising custodial control or supervision, the cabinet shall forthwith notify the Commonwealth's or county attorney and the local law enforcement agency or Kentucky State Police.

KRS 620.050(4)

All information obtained by the cabinet or its delegated representative, as a result of *an investigation* made pursuant to this chapter, shall not be divulged to anyone except:

(a) Persons suspected of causing dependency, neglect or abuse, provided that in such cases names of informants shall be withheld unless ordered by the court;

(b) The custodial parent or legal guardian of the child alleged to be dependent, neglected or abused;

(c) Persons within the cabinet with a legitimate interest or responsibility related to the case;

(d) Other medical, psychological, educational, or social service agencies, corrections personnel or law enforcement agencies, including the county attorney's office, that have a legitimate interest in the case;

(e) A noncustodial parent when the dependency, neglect or abuse is substantiated; or

(f) Those persons so authorized by court order.

KRS 620.060(1)

The court for the county where the child is present may issue an *ex parte* emergency custody order when it appears to the court that there are reasonable grounds to believe, as supported by affidavit or by recorded sworn testimony, that the child is in danger of imminent death or serious physical injury or is being sexually abused and that the parents or other person exercising custodial control or supervision are unable or unwilling to protect the child. Custody may be placed with a relative taking into account the wishes of the custodial parent or any other appropriate person or agency including the cabinet.

STATEMENT OF THE CASE

On November 15, 1991, Petitioner, Ian Hoffman ("Hoffman"), commenced this action under 42 U.S.C. §1983 against two social workers, Respondents, Tammy D. Harris, individually, and Colleen West, individually ("the social workers") who were employed by the Cabinet for Human Resources of the Commonwealth of Kentucky. Hoffman also asserted a §1983 damages claim against a private citizen, Respondent, Melisa Q. Hoffman, his estranged wife. He named Respondent, Commonwealth of Kentucky, Cabinet for Human Resources ("CHR"), as a §1983 defendant for the purpose of obtaining prospective injunctive relief.

On December 4, 1987, the Fayette Circuit Court, a Kentucky court of general jurisdiction, pursuant to its jurisdiction to dissolve the marriage of Hoffman and his estranged wife, had entered an order granting temporary custody to her, and granted him the right to physical custody in the form of "liberal visitation" with the infant child of their marriage, B.H. His physical custody of B.H. averaged nearly 50 percent of the time, from December 4, 1987, until November 16, 1990.

On November 16, 1990, that Fayette Circuit Court temporary custody order was still in effect. On that date, the social workers, acting in concert with and at the behest of his estranged wife, deprived Hoffman of his 14th Amendment-protected liberty right to the physical custody of his child by invoking in Fayette District Court a Kentucky statute [KRS 620.060(1)] to obtain an *ex parte* order to summarily strip him of that right. Because of KRS 610.010(1) & (6), jurisdiction over custody of B.H. lay with the Fayette Circuit Court rather than the Fayette District Court.

Pursuant to KRS 620.060(1), Harris made oath in Fayette District Court to obtain the *ex parte* order of which Hoffman complains. Harris' affidavit was, in its entirety, as follows:

> Child is allegedly being sexually abused by father Ian Hoffman. Parents are separated and father is to have a visit with this child on 11-16-90. Father was found by CHR to have sexually abused older sibling[1] . . . age 6 in June 1990.

On November 19, 1990, three days after the *ex parte* order was obtained, the first interview of the infant, B.H. was conducted by the Cabinet. Because of the *ex parte* order, Hoffman was denied physical custody of B.H. for several months thereafter.

On January 18, 1991, Hoffman was arrested on sex abuse charges precipitated by the individual Respondents. Because local law enforcement did not perceive grounds for probable cause, the Respondents had enlisted the aid of a Kentucky State trooper. On April 30, 1991, Hoffman was acquitted after brief jury deliberations. After acquittal, one of the social workers stated to Hoffman's defense counsel, in words and substance, that the matter was not over, and that she intended to continue to pursue Hoffman on the matter. It is because of this threat by the social worker, as an officer of the CHR, to continue to badger Hoffman, even

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[1] *J.H. v. Commonwealth, Cabinet for Human Resources*, Ky.App., 767 S.W.2d 330 (1988), held that evidence that one child may have been abused will not support a finding that another child in the same family was abused. No evidence that Hoffman sexually abused the older sibling was presented.

though he had been acquitted, that Hoffman demanded prospective injunctive relief against CHR in his Complaint.[2]

Finally, on December 9, 1992, after protracted litigation against his estranged wife over custody of B.H., Hoffman was awarded permanent legal custody of his child by the Fayette Circuit Court.

Hoffman claimed in his verified Complaint[3] (set out in its entirety at Appx. 43a-51a) that the statute [KRS 620.060(1)] invoked by the individual Respondents is procedurally defective under the Due Process Clause of the 14th Amendment under *Zinermon v. Burch*, 494 U.S. 113, 108 L.Ed.2d 100, 110 S.Ct. 975 (1990) (Due Process Clause requires a pre-deprivation hearing before taking liberty and property, where State can feasibly do so).

Additionally, Hoffman claimed that the individual Respondents achieved the deprivation of his constitutionally protected liberty interest by failing to see to it that the deprivation did not occur without adequate procedural protections, notwithstanding the absence of such safeguards from KRS 620.060(1).

Hoffman further claimed that a pre-deprivation hearing could have feasibly been provided before depriving him of his right to custody, that such pre-deprivation hearing would not have been unduly burdensome in proportion to the liberty interest at stake, and that the individual respondents had no reasonable grounds to believe that B.H. was in danger of imminent death or serious physical injury or was being sexually abused by Hoffman.

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[2] See, *Los Angeles v. Lyons*, 461 U.S. 95, 75 L.Ed.2d 675, 103 S.Ct. 1660 (1983).

[3] Respondents filed no affidavits to counter any allegation of the verified Complaint.

Hoffman sought compensatory and punitive damages from the individual Respondents and demanded a mandatory injunction against CHR, "its officers, agents, servants, employees, and attorneys" (Complaint, ¶31, Appx. 4a) from invoking the *ex parte* provisions of KRS 620.060(1), or otherwise undertaking to deprive Hoffman of his constitutionally protected liberty interest in the physical custody of his infant child, B.H.

Without benefit of any discovery or supporting affidavits, on January 15, 1992, the social workers and CHR moved for summary judgment. On March 2, 1992, Hoffman's estranged wife moved for summary judgment.

On June 25, 1992, after briefing by the parties, the trial court entered its Order and Judgment, inter alia, granting the summary judgment motions of the social workers and CHR and Hoffman's estranged wife.

Relying on *Salyer v. Patrick*, 874 F.2d 374 (6th Cir., 1989), the trial court decided that the social workers enjoyed absolute prosecutorial immunity from answering in damages to Hoffman's §1983 claim.

Relying on *Lee v. Patel*, 564 F.Supp. 755 (E.D.Va., 1983) and *Martin v. Supreme Court of State of N.Y.*, 644 F.Supp. 1537 (N.D.NY, 1986), the trial court decided that Hoffman's estranged wife was not a "state actor" under §1983.

Relying on *Alabama v. Pugh*, 438 U.S. 781 (1978), the trial court decided that the 11th Amendment barred Hoffman's §1983 claim for injunctive relief against the CHR.

Upon timely appeal, the 6th Circuit Court of Appeals, like the trial court, declined to address the underlying question of whether KRS 620.060(1) offended the Due Process Clause as not requiring a court, before issuing an *ex parte* order, to determine whether a pre-deprivation

hearing is feasible. Likewise, neither court below addressed the underlying question of whether the individual Respondents had violated Hoffman's rights under the Due Process Clause.

The statutory functions of the social workers are defined as being wholly investigatory by KRS 620.040(1) and KRS 620.050(4). Nevertheless, the Court below, relying on *Salyer v. Patrick, supra*, and *Buckley v. Fitzsimmons*, 509 U.S. ___, 125 L.Ed.2d 209, 113 S.Ct. 2606 (1993), held that the social workers enjoyed absolute prosecutorial immunity from answering in damages under §1983.

Hoffman by his verified Complaint alleged that the social workers and his estranged wife "acted in concert" and "jointly to deprive [him] of his constitutionally protected liberty right" to the physical custody of his child and that his estranged wife was "a state actor and acted under color of state law by reason of having acted together with and having obtained significant aid from" the social workers to effect the constitutional deprivation, all by invoking KRS 620.060(1), which is constitutionally defective under the principles of *Zinermon v. Burch, supra*. (Complaint, ¶¶13-17; Appx. 46a-47a).

Relying on portions of *Lugar v. Edmondson Oil*, 457 U.S. 922, 73 L.Ed.2d 482, 102 S.Ct. 2744 (1982), which define when a private citizen is *not* a state actor and *not* acting under color of state law, rather than the portions of *Lugar* which Hoffman pled and relied upon as defining when a private citizen *is* a state actor, the Court below held that Hoffman's estranged wife was not a state actor under §1983.

Solely because Hoffman named CHR as the defendant, rather than naming an official of the CHR in an official capacity, to obtain prospective injunctive relief relying on *Whittington v. Milby*, 928 F.2d 138 (6th Cir., *cert. denied*, 112 S.Ct. 236, 1991), which relied upon *Alabama v. Pugh*, *supra*, the court below held that his injunction claim was barred by the 11th Amendment.

The basis for federal jurisdiction in the court of first instance is 28 U.S.C. §1343(3) & (4).

REASONS FOR GRANTING THE WRIT

Issue No. 1: ***Is the 11th Amendment a bar to a federal court §1983 action for prospective injunctive relief because the complaint named the state agency as the §1983 defendant rather than naming an official of that agency in his or her official capacity?***

It was the form used by Hoffman to plead his claim for prospective injunctive relief which led to its dismissal. According to *Kentucky v. Graham*, 473 U.S. 159, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985), official capacity actions under §1983 are but another way of pleading the action against the entity of which an officer is an agent.

Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 n. 10, 105 L.Ed.2d 45, 58 n. 10, 109 S.Ct. 2304 (1989), reaffirmed this Court's position in *Kentucky v. Graham*, 473 U.S. at 167, n. 14, that a state official in his or her official capacity, when sued for injunctive relief, would be person under §1983 because official capacity actions for prospective relief are not treated as actions against the state for 11th Amendment purposes.

This Court granted certiorari in *Alabama v. Pugh*, 328 U.S. 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978) for the sole purpose of dismissing on 11th Amendment grounds a mandatory injunction claim asserted under the Constitution against the Alabama Board of Corrections (and the State of Alabama).

Here, prospective injunctive relief was sought under §1983 against the Cabinet for Human Resources of the Commonwealth of Kentucky, "its officers, agents, servants, employees, and attorneys," by naming the "Commonwealth of Kentucky, Cabinet for Human Resources" as a defendant. The state officials, the social workers, were sued in their individual capacities for damages only in

reliance upon *Hafer v. Melo*, 502 U.S. ___, 116 L.Ed.2d 301, 112 S.Ct. 358 (1991).

It was solely because of the method employed to plead the injunction claim against the state agency that the Court below held that the 11th Amendment barred it. Had the complaint sought injunctive relief against the Cabinet for Human Resources by the vehicle of naming the state officials in their official capacities, rather than seeking that relief directly against the Cabinet as it did, presumably the court below would not have ruled that the 11th Amendment was a bar to the prospective injunctive relief sought.

Alabama v. Pugh seriously conflicts, perhaps irreconcilably, with the principles of *Graham* and *Will*. Only if form is exalted over substance can the holding of *Alabama v. Pugh* (prospective injunctive relief may not be sought in federal court directly against a state agency because of the 11th Amendment) co-exist with the principles of *Graham* (official capacity action is but another way of pleading an action against an entity of which an officer is an agent), and *Will* (the 11th Amendment does not bar federal court §1983 actions for prospective injunctive relief brought against state officials in their official capacities).

This Court's decisions in *Corey v. White*, 457 U.S. 85, 72 L.Ed.2d 694, 102 S.Ct. 2325 (1982); *Green v. Mansour*, 474 U.S. 64, 88 L.Ed.2d 371, 106 S.Ct. 423, *reh den*, 474 U.S. 1111, 88 L.Ed.2d 933, 106 S.Ct. 900 (1985); *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 109 L.Ed.2d 264, 110 S.Ct. 1868 (1990), although implicating the 11th Amendment, are inapposite because the necessary element of the legal fiction of *Ex Parte Young*, 209 U.S. 123, 159-160, 52 L.Ed. 714, 28 S.Ct. 441 (1908) was absent, i.e., there were no claims of constitutionally impermissible conduct by a state official.

It is with some trepidation that Hoffman suggests that it would be appropriate for this Court to revisit the meaning of the 11th Amendment. If the 11th Amendment were applied to this case according to its plain language, the Amendment would be no bar to Hoffman's claim for prospective injunctive relief against an agency of the state of his residence. See *Green v. Mansour*, 474 U.S. at 74, Brennan, Marshall, Blackmun and Stevens, dissenting. Hoffman's trepidation acknowledges the immense body of precedent interpreting and applying the 11th Amendment in a manner other than its plain language would require, i.e., as being applicable as a bar to federal court actions by a citizen against the state of his residence.

This Court ought to grant the writ so as to revisit its non-literal interpretation of the 11th Amendment, or at a minimum decide whether the legal fiction of *Ex Parte Young* requires that form must prevail over substance in federal court §1983 actions when prospective injunctive relief is sought against a state agency by turning the decision on the manner in which the state agency is named in the complaint.

Issue No. 2: ***Is a private citizen, answerable under 42 U.S.C. §1983, as acting under color of state law when she acted together with or obtained significant aid from two state social workers to deprive the §1983 plaintiff of his constitutionally protected liberty interest in the physical custody of his child by invoking a statute, challenged by the §1983 plaintiff as being procedurally defective under the Due Process Clause under principles in this Court's opinion of Zinermon v. Burch?***

Issue No. 3: ***Where a §1983 Plaintiff claims that a §1983 defendant/private citizen acted together with and obtained significant aid from two co-defendant/state social workers to invoke a statute, challenged by the Plaintiff as being unconstitutional, must the court decide whether the statute is constitutional before it can adjudge whether the private citizen is a state actor for purposes of §1983?***

Issue No. 4: ***Is the Due Process Clause offended by a state statute that, without regard to whether a pre-deprivation hearing is feasible, authorizes a court to issue an ex parte order to deprive a parent of his constitutionally protected liberty interest in the physical custody of his child?***

These three (3) issues are interrelated: Issue 2[4] asks if the private citizen was a state actor under §1983, Issue 3 asks whether "state actor" status depends upon a decision by the trial court that the statute challenged by the §1983 plaintiff is actually unconstitutional and Issue 4 asks whether the challenged statute is in fact unconstitutional.

Neither court below addressed the question of whether Hoffman's constitutional rights were violated by Respondents nor did they address the question of the constitutionality of the statute [KRS 620.060(1)] invoked

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[4]"State actor" as used in this Petition includes the "acting under color of state law" element of §1983 actions.

jointly by the Respondent/private citizen with her co-Respondent/social workers.

Lugar v. Edmondson Oil, supra, 457 U.S. 922, 73 L.Ed.2d 482, 102 S.Ct. 2744 (1982), the leading case on private citizen liability under §1983, summarized its holding, as follows: "Petitioner did present a valid cause of action under §1983 insofar as he *challenged* the constitutionality of the Virginia statute . . . ." 457 U.S. at 942. (Emphasis added).

Lugar clearly held that if the state statue invoked by the joint action of a private person and state officials is *challenged* by the §1983 plaintiff as being constitutionally defective, "state actor" status of a §1983 private person/ defendant is established. *Lugar* is not at all clear, however, that "state actor" status of a §1983 private person/ defendant is dependent upon the "challenged" statute actually being unconstitutional, although earlier case law was fairly settled that the statute implicated in *Lugar* was unconstitutional,

Hoffman challenged the constitutionality of KRS 620.060(1), as authorizing the issuance of an *ex parte* order to deprive a parent of custody regardless of whether a pre-deprivation hearing is feasible. The statute does not require the judge to make a determination of whether a pre-deprivation hearing is feasible before issuing the *ex parte* order. It is settled that natural parents have a fundamental liberty interest in the care, custody, and management of their child which is protected by the Due Process Clause. *Santosky v. Kramer*, 455 U.S. 745, 71 L.Ed.2d 599, 102 S.Ct. 1388 (1982). The statute invoked by the Respondent/private citizen and her co-Respondent/social workers is unconstitutional under *Zinermon v. Burch*, 494 U.S. 113, 108 L.Ed.2d 100, 110 S.Ct. 975 (1990).

The Eighth Circuit in *Roudybush v. Zabel*, 813 F.2d 173, 177 (8th Cir. 1987), held, relying on its earlier authorities:

> . . . we have consistently found that Lugar's state policy component is met when the [private] party charged with an unconstitutional deprivation has acted in conformity with an *allegedly* unconstitutional state statute or well-settled custom. (Brackets and emphasis supplied).

The Tenth Circuit in *Taylor v. Gilmartin*, 686 F.2d 1346 (10th Cir. 1982), relying on *Lugar*, dismissed a §1983 claim noting that the complaint did not allege that the state's guardianship statute was constitutionally defective, and further noted that *Lugar*, 112 S.Ct. at 2755 n. 21, limited its holding "to the factual situation where a prejudgment attachment order is at issue." 686 F.2d at 1355.

If a §1983 plaintiff need only allege that the joint action of a private person and state officials was pursuant to a statute which the §1983 plaintiff *challenges* as being constitutionally defective in order to allege that the private person was a "state actor" for purposes of §1983, then Hoffman's verified Complaint met that pleading standard.

If, on the other hand, the subject statute must actually be unconstitutional before a private person can be deemed a "state actor" for purposes of §1983, rather than merely have its constitutionality challenged by the §1983 plaintiff, the trial court cannot escape addressing the question of the statute's constitutionality when deciding "state actor" status of a private person.

Under the "challenged constitutionality" approach, the opinion below conflicts with this Court's summary of its holding in *Lugar*, and the Eighth Circuit's rule, both set out

above. If "actual unconstitutionality" is the standard, for determining "state actor" status of a §1983 private person/defendant, then the writ should be granted so that this Court can hold that the trial court must decide the constitutionality of the statute invoked before it can adjudge whether the private citizen is a state actor for purposes of §1983.

If the Tenth Circuit erred in *Taylor v. Gilmartin* by suggesting that the holding of *Lugar* is limited to the factual situation where a prejudgment attachment order is at issue, this Court ought to grant the writ to resolve the conflict in the circuits. Neither the Sixth Circuit court below nor the Eighth Circuit in *Zabel* so restricted *Lugar*'s application.

Issue No. 5: ***Do state social workers, sued in their individual capacities, enjoy absolute prosecutorial immunity from answering in §1983 damages for seeking and obtaining an ex parte court order that deprived the §1983 plaintiff of his 14th Amendment protected liberty interest in the physical custody of his child?***

The Sixth Circuit took the "functional approach" to the immunity defense of *Forrester v. White*, 484 U.S. 219 (1988) and turned it inside out. That approach was applied and characterized in *Buckley v Fitzsimmons*, *supra*, as an examination of "the nature of the function performed, not the identity of the actor who performed it." *Buckley*, 113 S.Ct. at 2613.

At least the Ninth Circuit, the Sixth Circuit in *Salyer v. Patrick, supra,* and again in the opinion below, extend absolute immunity to social workers. When §1983 was enacted, social workers had no identifiable immunity at common law. On the theory that the function performed by the social workers in initiating change of custody proceedings resembles that of criminal prosecutors in commencing criminal proceedings, the Sixth Circuit and the like-minded circuit mentioned below, extended to social workers the absolute immunity enjoyed by criminal prosecutors.

The inquiry of *Forrester* and *Buckley*, however, is whether a state official who enjoyed absolute immunity at common law when §1983 was enacted -- *Forrester* involved a judge and *Buckley* involved a criminal prosecutor -- continues to enjoy that immunity regardless of the function performed.

Because the judge in *Forrester* was engaged in discharging an employee rather than acting judicially, and the criminal prosecutor in *Buckley* was engaged in investigatory matters and making statements to the press

rather than prosecuting, each lost the absolute immunity he otherwise would have enjoyed.

The following federal courts have held that state social workers whose actions interrupted the custodial relationship between parent and child *did not* enjoy absolute immunity from liability under §1983:

The Tenth Circuit in *Snell v. Tunnell*, 920 F.2d 673 (10th Cir. 1990), held that Oklahoma social workers who applied for and obtained an order for conditional protective custody of children did not enjoy absolute immunity as §1983 defendants. Their function, like that of the social workers here was, ". . . to report findings of neglect or abuse, even those which might indicate a need for immediate intervention, to other authorities for further investigation or advocacy in the form of initiation of court proceedings." *Id.*, at 690. The *Snell* Court, at 690, specifically distinguished its holding from *Salyer v. Patrick*, *supra*, the case relied on by the Court below.

The Tenth Circuit in *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989), subjected the absolute rather than qualified immunity defense to elaborate analysis, *Id.*, at 1381-83, to finally conclude that social workers who had removed a child from pre-adoptive foster parents without a prior agency hearing were not entitled to absolute immunity in a §1983 action.

The Eighth Circuit in *Doe v. Hennepin County*, 858 F.2d. 1325 (8th Cir. 1988), held that county welfare agency officials were qualifiedly immune from §1983 damages for the removal of children from a family upon receipt of allegations of abuse.

The Ninth Circuit in *Baker v. Racansky*, 887 F.2d 183 (9th Cir. 1989), proceeded under the assumption that social workers who had removed a suspected child abuse victim from his parents' physical custody and taken him

into temporary protective custody enjoyed only qualified immunity.

The Court in *Czikalla v. Malloy*, 649 F.Supp. 1212 (D.C. Colo., 1986), pointed out that social workers have no mechanism to control their possible misconduct, similar to the enforcement of the organized bar to which criminal prosecutors are subject. Citing *Doe v. County of Suffolk*, 494 F.Supp. 179 (E.D.N.Y. 1980), for its holding that the actions of a social worker are more like that of a police officer than a prosecutor. *Malloy* held that county social workers who had removed children from their parents' custody pursuant to state statutes were not entitled to absolute immunity in the civil rights action brought against them by the parents.

The Fifth Circuit in *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988), held that Texas child protective service workers were not shielded by absolute immunity from liability in a §1983 action for the temporary removal of children from their parents' home without first obtaining a court order.

The Court in *Rinderer v. Delaware County Children and Youth Services*, 703 F.Supp. 358 (E.D.Pa. 1987), pointed out, at 361, that "[a]lthough courts are split, the majority view is that social workers, unlike prosecutors, do not enjoy absolute immunity," citing cases and agreed with the majority view.

The following two federal courts have held that state social workers whose actions interrupted the custodial relationship between parent and child enjoyed absolute immunity from liability under §1983:

The Sixth Circuit in *Salyer v. Patrick*, *supra*, so held.

The Ninth Circuit in *Meyers v. Contra Costa County Department of Social Services*, 812 F.2d 1154 (9th Cir. 1987), held that a California social worker *whose*

responsibility included the bringing of dependency proceedings enjoyed absolute prosecutorial immunity from §1983 liability for initiating dependency proceedings against a parent suspected of abusing his child.

Imbler v. Pachtman, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976), held that a state prosecutor who acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case was absolutely immune from a civil suit for damages under §1983.

Burns v. Reed, 500 U.S. ___, 114 L.Ed.2d 547, 111 S.Ct. 1984 (1991), held that a local prosecutor is entitled only to whatever defense qualified immunity affords him for purposes of damages liability under §1983 in connection with his conduct during the investigatory phase of a criminal case.

Buckley v. Fitzsimmons, supra, applying the "functional approach" of *Burns* to look at "the nature of the function performed, not the identity of the actor who performed it," *Forrester v. White*, 484 U.S. at 299, held that the §1983 claim against the state prosecutor for allegedly fabricating evidence and the §1983 claim for statements of the prosecutor at a press conference were not claims entitling the prosecutor to absolute immunity.

The conflict between the circuits needs resolution.

Issue No. 6: ***If state social workers, sued in their individual capacities, enjoy absolute prosecutorial immunity from answering in §1983 damages for seeking and obtaining an ex parte court order that deprived the §1983 plaintiff of his 14th Amendment protected liberty interest in the physical custody of his child, is that absolute prosecutorial immunity lost either because the social workers are statutorily restricted to performing investigatory functions only, or because they knew or should have known that jurisdiction over child custody lay with a court other than the court where they sought and obtained the ex parte order?***

Granting the writ will afford this Court the opportunity to decide under what circumstances absolute immunity, if it exists, can be lost. This is so because of the special facts of this case: the social workers went outside their investigatory duties to obtain an *ex parte* order from a court which they should have known lacked the jurisdiction to issue. See KRS 610.010(1) & (6).

Although judicial officers enjoy absolute immunity *for acts within their judicial role*, *Stump v. Sparkman*, 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978), that immunity is lost when the judicial officer acts in the absence of all jurisdiction.

If the application by the social workers for the *ex parte* order is deemed to be prosecutorial, then that application was outside their statutory duties as defined by KRS 620.040(1) and 620.050(4).[5] As such the principle of

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[5] *Johnson v. Correll*, Ky., 332 S.W.2d 843, 845 (1960) held: Powers not conferred [by statute] are just as plainly prohibited as those which are expressly forbidden. When powers are given to be performed in a specified manner, there is an implied restriction upon the exercise of those powers in excess of the grant.

Stump should apply, and absolute immunity, if it exists, be lost.

If obtaining the *ex parte* order is somehow deemed an investigatory function, then the principle of *Burns v. Reed* would apply and the social workers would be entitled only to whatever defense qualified immunity affords them.

By granting the writ sought here, this Court can adjudicate for the first time whether state social workers enjoy the same absolute immunity which prosecuting attorneys enjoy when acting within the scope of their duties in initiating and pursuing criminal prosecutions.

There are many zealous as well as over-zealous social workers abroad in the land. Whether, or under what circumstances, they can be made to answer for constitution-offending conduct should be decided this Court by granting the writ sought.

CONCLUSION

WHEREFORE, Petitioner prays that his Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be granted to review the decision thereof, with proceedings pursuant to the Rules of this Court.

Respectfully submitted,

WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40507
(606) 254-9086
ATTORNEY FOR PETITIONER

APPENDIX

FILED
SEP 21 1993
LEONARD GREEN, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
NO. 92-6161
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IAN HOFFMAN,)
Plaintiff-Appellant,)
)
v.)
TAMMY D. HARRIS, COLLEEN WEST,)
MELISA HOFFMAN, COMMONWEALTH)
OF KENTUCKY CABINET FOR HUMAN)
RESOURCES)
Defendants-Appellees.)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

BEFORE: JONES and NORRIS, Circuit Judges; and CLELAND, District Judge.*

PER CURIAM. Plaintiff-Appellant Ian Hoffman appeals the summary judgment for the defendants in this §1983 action. The district court granted the judgment on immunity grounds, and we affirm.

I.

Hoffman brought suit under 42 U.S.C. §1983 (1988), alleging that Defendants wrongfully acted under color of state law to deprive him of his constitutionally protected liberty interest in visitation with his minor daughter, known as "B.H." Defendant Melisa Hoffman is the former wife of the plaintiff. The two of them separated in 1987, at which time she was awarded custody of B.H. while he received visitation privileges for five nights out of every two weeks. Ian Hoffman was scheduled to have visitation on November 16, 1990. Shortly before that date, Melisa Hoffman contacted the Commonwealth of Kentucky Cabinet for Human Resources ("CHR") and reported that Ian had been sexually molesting B.H.

Defendants Tammy Harris and Colleen West are social workers for CHR. Acting on Melissa's suspicion, they obtained from a state court an ex parte order, issued pursuant to a Kentucky statute, blocking Ian Hoffman's

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*Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

visitation.[1] Subsequent to the ex parte order, the state brought criminal charges against the plaintiff, charging him with sexually molesting B.H. During the time these charges were pending, Hoffman's visitation rights were for a time completely eliminated and for a time drastically reduced. A jury acquitted him of the charges on April 30, 1991.

Hoffman then filed his complaint in this action against Melissa Hoffman, the two social workers, and CHR. The defendants moved for summary judgment and both sides briefed the issues. Hoffman then filed a motion under Federal Rule of Civil Procedure 56(f) for the court to order a continuance of the proceedings because more discovery was needed. The Court denied that motion and granted the summary judgment motion, finding all the defendants immune from suit. This timely appeal followed.

The district court's grant of summary judgment is to be reviewed *de novo*. *Rector v. General Motors Corp.*, 963

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[1]The state court issued the order persuant (sic) to § 620.060(1) of the Kentucky Revised Statutes Annotated, which provides:

> The court for the county where the child is present may issue an ex parte emergency custody order when it appears to the court that there are reasonable grounds to believe, as supported by affidavit or by recorded sworn testimony, that the child is in danger of imminent death or serious physical injury or is being sexually abused and that the parents or other person exercising custodial control or supervision are unable or unwilling to protect the child. Custody may be placed with a relative taking into account the wishes of the custodial parent or any other appropriate person or agency including the cabinet.

The Kentucky statutes also state, in §620.060(3), that the emergency custody order shall be effective for no longer than 72 hours, unless a temporary removal hearing with notice to the affected parent is held. Ian Hoffman challenges neither the timeliness nor the constitutionality of the post-removal hearing in this case.

F.2d 144, 146 (6th Cir. 1992). The question on review of a summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986).

II

The district court held that the social workers, Harris and West, had absolute immunity from §1983 liability under *Salyer v. Patrick*, 874 F.2d 374 (6th Cir. 1989). Following *Salyer*, we affirm this conclusion.

Salyer held that family service workers have absolute immunity in filing juvenile abuse petitions. *Id.* at 378. The *Salyer* immunity derives from the common law absolute immunity that judges and prosecutors have always had under §1983, an immunity that ensures they are not deterred from vigorously performing their jobs as they might be if they feared personal liability. In *Butz v. Economu*, 438 U.S. 478 (1978), the Supreme Court extended this prosecutorial immunity to administrative officials performing prosecutorial actions. *Salyer* applied this "quasi-prosecutorial" immunity to social workers instituting legal actions.

Salyer does not require, however, that a social worker has absolute immunity in any role relating to a child abuse prosecution. In *Achterhof v. Selvaggio*, 886 F.2d 826 (6th Cir. 1989), we held that a social worker in an "investigatory" role receives only qualified immunity from §1983 actions. The basis for *Achterhof* is that, when investigating, the social worker has exceeded the prosecutorial function and is performing a standard administrative one that receives only the qualified immunity usually given to government officials. This circuit's distinction between *Salyer* and *Achterhof* follows Supreme

Court precedent, including the Court's recent decision *Buckley v. Fitzsimmons*, 113 S.Ct. 2606 (1993). In *Buckley*, the Court emphasized the "functional approach" to determining absolute immunity, which looks to "'the nature of the function performed, not the identity of the actor who performed it.'" *Id.* at 2613 (*quoting Forrester v. White*, 484 U.S. 219, 229 (1988)). *Buckley* held that the activities of searching for clues at the scene of a crime and of making assertions to the media are functions that are not absolutely immunized, even for prosecutors themselves. *Id.* at 2616-17.

Here, there is no evidence that a genuine issue of material fact exists regarding whether Harris and West fall under the scope of *Salyer*'s absolute immunity or *Achterhof*'s qualified immunity. They fall squarely under *Salyer*. The complaint alleges only that the social workers harmed Hoffman when they "invoked" the Kentucky statute and when they "testified" against him to receive the *ex parte* order to block his visitation. J.A. at 10, 11. These clearly are the sort of actions that *Sayler* (sic) countenanced when granting absolute immunity in filing a child abuse petition. Besides bald assertions that Harris and West were acting outside of *Sayler*'s (sic) scope, the plaintiff offers nothing that would indicate that there is any genuine question that they were. *Sayler* (sic) requires us to grant absolute immunity to the social workers here.

The district court also found immune the estranged wife, Melisa Hoffman, who contacted CHR with allegations of sexual abuse of her daughter, on the ground that she was not a state actor under §1983. We need not even apply *Salyer* to Melisa Hoffman's function in this case, for she was not acting on behalf of the state and thus cannot have violated the Appellant's due process rights. A private person "may fairly be said to be a state actor" under *Lugar*

v. Edmondson Oil, 457 U.S. 922, 937 (1982), only if she has obtained "significant aid" from state officials or if her conduct is "otherwise chargeable" to the state. This occurs where the state has exercised "coercive power" over, or given "significant encouragement" to, the private party. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1992); *Simescu v. Emmet Co. Dep't of Soc. Serv.*, 942 F.2d 372, 374 (6th Cir. 1991). Without such limits upon who is a state actor, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Lugar*, 457 U.S. at 937. Melisa Hoffman presumably knew that Kentucky law forbids child abuse, and reported her concerns. As a matter of law, a mother who reports her suspicions of her daughter's sexual abuse is not a state actor and therefore cannot be liable under §1983.

III

The district court further held that the Eleventh Amendment to the United States Constitution renders CHR immune from all relief in this §1983 suit. This holding follows Sixth Circuit law. In fact, we have previously so held for this particular defendant in another §1983 action.

> The Kentucky Cabinet of Human Resources [sic] was not subject to suit by [Plaintiff] because a state agency may not be sued in federal court, regardless of the relief sought, unless the state has waived its sovereign immunity or Congress has overriden (sic) it. *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S. Ct. 3057, 57 L.Ed.2d 1114 (1978). It is well settled that "Congress [did not] intend[] (sic) by the general language of §1983 to override the traditional sovereign immunity of the

> States." *Quern v. Jordan*, 440 U.S. 332, 342, 99 S.Ct. 1139, 1145, 59 L.Ed.2d 358 (1979).

Whittington v. Milby, 928 F.2d 188, 193-94 (6th Cir.), *cert.denied*, 112 S.Ct. 236 (1991). This holding requires us to find CHR--sued in its own name in the complaint--immune from all relief sought.[2]

IV

Hoffman also asks us to review the district court's denial of his Rule 56(f) motion to postpone judgment pending further discovery. Though we review a summary judgment itself *de novo*, the district court has wide discretion in denying Rule 56(f) motions, and we review such a denial only to determine whether the district court has abused its discretion and caused substantial prejudice to a party. *Elvis Presley Enterprises v. Elvisly Yours*, 936 F.2d 889, 893 (6th Cir. 1991).

Hoffman's Rule 56(f) motionis (sic) simply a bald assertion that he needs more time. J.A. 101-103. A mere assertion that further discovery will reveal a genuine issue of material fact is insufficient grounds for granting a 56(f) motion. The moving party has the burden of demonstrating "why he could not oppose the summary judgment motion by affidavit and how postponement of a ruling on the motion would enable him to rebut Appellees' showing of the absence of a genuine issue of fact." *Emmons v.*

---

[2]We note that the Appellant did not name an official of CHR as a party to his complaint. An official can be sued for injunctive or declaratory relief when it is alleged that the official violated the plaintiff's constitutional rights. *E.g., Thiokol Corp. v. Department of Treasury, State of Michigan*, 987 F.2d 376, 381 (6th Cir. 1993); *Ex Parte Young*, 209 U.S. 123, 155-56 (1908); *cf. Heller v. Doe*, 113 S. Ct. 2637 (1993) (CHR Secretary sued in his own name for due process and equal protection violations).

McLaughlin, 874 F.2d 351, 357 (6th Cir. 1989); *see also Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 833 (10th Cir. 1986). The district court therefore did not abuse its discretion in denying the Rule 56(f) motion.

V

For the reasons stated above, we have no power to reach the merits of the alleged §1983 violation in this case, as the various named defendants are immune from suit. As no other reversible error has been shown, we affirm the judgment of the district court.

Eastern District of Kentucky
FILED
AUG 19 1992
AT LEXINGTON
LESLIE G. WHITMER
CLERK: U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-526

IAN HOFFMAN, PLAINTIFF

V. ORDER

TAMMY D. HARRIS, ET.AL., DEFENDANTS

* * * * *

This matter comes before the Court on the Motion of the Plaintiff pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to Alter, Amend or Vacate the Judgment entered herein on June 25, 1992, in favor of the Defendants. The matter is fully briefed and ripe for review by the Court.

Most of the arguments made by Plaintiff are rehashed versions of the arguments he put forth in responding to the summary judgment motions. As the Court has previously considered these arguments and concluded that the Defendants were entitled to summary

judgment despite them, it will not review the identical arguments.

However, the Plaintiff criticizes the Court's Order and Judgment on a few additional grounds. As to Defendant Melisa Hoffman, the Plaintiff argues that contrary to the Court's findings, she was a state actor and asserts that the Court did not examine this allegation in light of Lugar v. Edmondson Oil, 457 U.S. 922 (1982). Plaintiff argues that in order to do so, the Court must first consider the constitutionality of KRS 620.060(1).

The Plaintiff has blatantly mischaracterized the Lugar holding. Plaintiff argues that Lugar mandates examination of the constitutionality of the state statute prior to a determination of whether the state citizen's actions were properly chargeable to the state. In reality, the Lugar Court stated that "the first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether . . . private parties, may be appropriately characterized as 'state actors.'" 457 U.S. 939.

Melisa Hoffman's action in reporting her suspicion that her daughter was being sexually abused did not result from "the exercise of a right or privilege having its source in state authority." Her action resulted from her status as the mother of two children. This is additional support for the Court's finding that summary judgment in favor of Melisa Hoffman is appropriate. Plaintiff's argument to the contrary is without merit.

As to Defendants Harris and West, the Plaintiff argues that the court failed to address the impact of KRS 620.050(4) upon Plaintiff's argument that Harris and West acted outside the scope of their duties. Plaintiff argues that Harris and West divulged the results of their investigation to

a district court judge, and a district court judge is not one of the persons to whom such information may be divulged as specified in KRS 620.050(4), therefore they acted outside the scope of their duties.

> KRS 620.050(4) states, in relevant part, as follows:
>
> All information obtained by the cabinet or its delegated representative . . . shall not be divulged to anyone except:
>
> (d) Other medical, psychological, education, or social service agencies, corrections personnel or law enforcement agencies, including the county attorney's office, that have a legitimate interest in the case; [or] . .
>
> .
>
> (f) Those persons so authorized by court order.

To argue that a district court judge may not be the recipient of such information in the face of a statute which recognizes that a court may order the same information to be divulged to others is, at the very least, illogical.

For the foregoing reasons, IT IS HEREBY **ORDERED** that the Motion of the Plaintiff pursuant to Rule 56 is **DENIED.**

This 19th day of August, 1992.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

Eastern District of Kentucky
FILED
JUN 25 1992
AT LEXINGTON
LESLIE G. WHITMER
CLERK: U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-526

IAN HOFFMAN, PLAINTIFF

V. ORDER AND JUDGMENT

TAMMY D. HARRIS, ET.AL., DEFENDANTS

* * * * *

In accordance with the Memorandum Opinion issued on the same date herewith, IT IS HEREBY **ORDERED** as follows:

1. That the Motion of the Defendant Melisa Hoffman to Amend her Answer is **DENIED;**

2. That the Plaintiff's Motion to postpone consideration of the pending summary judgment motions pursuant to Fed.R.Civ.P. 56(f) is **DENIED;**

3. That the Motion of the Defendant Melisa Hoffman for Summary Judgment is **GRANTED** and Judgment is hereby **ENTERED** in her favor;

4. That the Motion of Defendants Harris, West, Commonwealth of Kentucky and the Cabinet for Human Resources (CHR) to Strike the Plaintiff's Response to their Motion for Summary Judgment is **DENIED;**

5. That the Motion of Defendants Harris, West, Commonwealth of Kentucky and CHR for Summary JUDGMENT is **GRANTED** and Judgment is hereby **ENTERED** in their favor; and

6. All issues being hereby decided, this action is **DISMISSED** and **STRICKEN** from the Court's active docket.

This 25th day of June, 1992.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

Eastern District of Kentucky
FILED
JUN 25 1992
AT LEXINGTON
LESLIE G. WHITMER
CLERK: U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-526

IAN HOFFMAN, PLAINTIFF

V. MEMORANDUM OPINION

TAMMY D. HARRIS, ET.AL., DEFENDANTS

* * * * *

I. INTRODUCTION

This matter is before the Court on various pending motions brought by several parties to this action. The pending motions are as follows: 1) Motion of Defendants Tammy Harris, Colleen West and the Commonwealth of Kentucky for Summary Judgment; 2) Motion of Defendants Harris, West and the Commonwealth of Kentucky to Strike the Plaintiff's Response to their Motion for Summary Judgment; 3) Motion of Defendant Melisa Hoffman for Summary Judgment; 4) Motion of Defendant Melisa Hoffman to Amend Answer; and 5) Motion of the Plaintiff pursuant to Rule 56(f) of the Federal Rules of Civil Procedure to Refuse the Application(s) for Summary

Judgment and Order a Continuance for Plaintiff to Complete Additional Discovery.

Opposing parties have filed responses to each motion and the various matters are now ripe for a review by the Court. To proceed though this melange of motions in the most logical manner, the Court will first consider the Motion of Melisa Hoffman to Amend her Answer, then turn to the Plaintiff's Motion Pursuant to Fed.R.Civ.P. 56(f) and finally address the summary judgment issues.

II. FACTUAL BACKGROUND

Ian Hoffman brought suit under 42 U.S.C. §1983, alleging the Defendants wrongfully acted under color of state law to deprive him of his constitutionally protected liberty interest in the physical custody of his child. Defendant Melisa Hoffman ("Melisa") is the mother of B.H., a minor child of Ian Hoffman. Defendants Tammy Harris ("Harris") and Colleen West ("West") are social workers with the Kentucky Cabinet for Human Resources ("CHR").

Melisa was separated from her then-husband Plaintiff Ian Hoffman during November of 1990, the relevant time period. Melisa had temporary custody of B.H. The Plaintiff was scheduled to have visitation with B.H. on November 16, 1990.

Prior to the scheduled visitation, Melisa contacted CHR and reported that Ian Hoffman had been sexually molesting B.H. Thereafter, an ex parte order was obtained which gave full custody of B.H. to Melisa and allowed Plaintiff to have only one hour per week of supervised custody of the child.

In January of 1991, criminal charges were brought against the Plaintiff accusing him of sexually molesting B.H. For approximately two weeks, between the time of Hoffman's initial appearance in Fayette District Court to the

time he waived formal hearing of the charges and the case was sent to the Fayette County Grand Jury, Plaintiff was allowed no visitation with B.H. The day after the case was waived to the grand jury, Plaintiff's visitation with B.H. was reinstated.

On February 27, 1991, Plaintiff's visitation was again limited to weekly sessions. On March 8, 1991, Plaintiff was arraigned on felony charges in Fayette Circuit Court and the court ordered the elimination of all visitation pending resolution of the criminal charges. On April 30, 1991, the Plaintiff was acquitted on criminal charges by a Fayette County jury.

Plaintiff initiated this action on November 15, 1991, alleging the Defendants violated his rights under the Due Process Clause of the 14th Amendment and seeking relief in the form of a declaration that KRS 620.060(1) is unconstitutional.

III. MOTION OF MELISA HOFFMAN TO AMEND ANSWER

The Defendant Melisa Hoffman seeks to amend her answer to include a fourth defense of immunity under K.R.S. 620.050. No supporting memorandum was submitted to accompany this Motion and Melisa relies only upon the authority of Rule 15 of the Federal Rules of Civil Procedure.

Rule 6(a) of the Joint Local Rules of the U.S. District Courts of the Eastern and Western Districts of Kentucky states, in pertinent part, as follows: "Except for routine motions, . . . each motion shall be accompanied by a supporting memorandum which complies with the provisions of this RULE. Failure to do so may be grounds for denying the motion."

The Plaintiff objects to the Motion to Amend, arguing that under the Supreme Court's holding in Foman

v. Davis, 371 U.S. 178 (1962), a motion to amend should not be granted when the amendment would be futile. The Plaintiff argues that adding this immunity defense would be futile because the cited statute is a state statute intended to give immunity to one who in good faith reports suspected child abuse or neglect, and under Felder v. Casey, 487 U.S. 131 (1988), a state law may not operate to immunize a defendant from Section 1983 liability.

The Defendant filed no reply.

The Felder Court held that "a state law that immunizes government conduct otherwise subject to suit under §1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy." Id. at 139 (citation omitted).

Plaintiff's only claim against Defendant Melisa is a federal one based on Section 1983. Therefore, Melisa Hoffman's Motion to Amend her Answer must be denied.

IV. PLAINTIFF'S MOTION PURSUANT TO RULE 56(f)

The Plaintiff moves the Court to postpone consideration of the pending summary judgment motions, arguing that no discovery has yet been taken in this action. In effect, the Plaintiff is asking the Court to review the motions for summary judgment, the Plaintiff's responses thereto, and if the Court determines that the Plaintiff has not set forth specific facts showing a genuine issue for trial, then to deny the motions and order a continuance to permit him to obtain additional discovery.

Defendants Harris and West respond that Rule 56(b) imposes no requirement on a movant to support a motion for summary judgment with affidavits or other materials negating the opponent's claim. They also argue that the Plaintiff has misconstrued the purpose of Rule 56(f), which

they contend is to allow a party additional time to complete discovery if he or she is unable to respond to a summary judgment motion. The Defendants contend the instant motion is inappropriate because the Plaintiff has set forth no facts showing that he is unable to rebut the Defendants' Motion for Summary Judgment. Defendants further argue that the very fact that the Plaintiff filed a lengthy response to the Motions for Summary Judgment defeats the argument that he is unable to respond to the motions.

The Court notes that the Plaintiff has failed to comply with the requirement of Rule 56(f) to file an affidavit in order to request a delay in ruling on the summary judgment motion pending further discovery. Numerous courts have held that a Rule 56(f) motion may not be granted in the absence of an affidavit setting forth the reasons why the affiant is unable to present the facts justifying a postponement of the court's consideration of the summary judgment motion. See Keebler Co. v. Murray Bakery Products, 886 F.2d 1386 (C.A. Fed. 1989), Helmich v. Kennedy, 796 F.2d 1441 (11th Cir. 1986).

In United States v. Hodges X-Ray, Inc., 759 F.2d 557 (6th Cir. 1985), the court noted that "the provisions of Fed.R.Civ.P. 56(e) . . . demand that sworn affidavits [be] submitted.

Additionally, the Sixth Circuit in Emmons v. McLaughlin, 874 F.2d 351, 356-57 (6th Cir. 1989) approvingly cited the following language from Willmar Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 289, 297 (8th Cir. 1975), *cert.den.* 424 U.S. 915 (1976):

> "Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking his protections

> must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact. Where, as here, a party fails to carry his burden under Rule 56(f), postponement of a ruling on a motion for summary judgment is unjustified."

It is clear that Hoffman has not sustained the burden of demonstrating why he cannot oppose the pending summary judgment motions. Contrary to the requirement of Rule 56(f), he has filed no affidavit in support of his Motion stating why he is unable to oppose the Summary Judgment Motions. The Court interprets Hoffman's Motion as a request that the Court evaluate the summary judgment motions and his responses thereto and determine if grounds exist for the Rule 56(f) motion. This is an extraordinary request which should not be granted.

For the foregoing reasons, Plaintiff Hoffman's Motion under Rule 56(f) must be denied.

V. SUMMARY JUDGMENT MOTIONS

A. Standards for Summary Judgment

Summary judgment is appropriate if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The Court must consider all pleadings, depositions, affidavits, and admissions on file and draw reasonable inferences in favor of the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); see Smith v. Hudson,

600 F.2d 60 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979).

Once the movant shows that there is an absence of evidence to support the nonmoving party's case, the opposing party has the burden of coming forward with evidence raising a triable issue of fact. Celotex Corp., 477 U.S. at 323. To sustain this burden, the opposing party may not rest on the mere allegations of his pleadings. Instead, it must set forth specific facts showing that there is a genuine issue for trial. Potter's Med. Center v. City Hosp. Ass'n., 800 F.2d 1129 (6th Cir. 1986).

Ultimately, the standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1310 (6th Cir. 1989) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)).

Applying these standards, the Court determines that the Defendants are entitled to summary judgment.

B. Motion of Melisa Hoffman for Summary Judgment

1. Motion

The Defendant Melisa Hoffman moves for summary judgment on the ground that she is a private citizen rather than a state actor and therefore cannot be a party defendant in an action brought under 42 U.S.C. §1983. Citing Caulder v. Durham Housing Authority, 401 U.S. 1003 (1971), Melisa argues that to act under color of state law, a private citizen must derive legal authority or financial assistance from the state government and that she derived neither from the Commonwealth of Kentucky.

Defendant Hoffman asserts that her only action was in reporting her suspicion that her child had been sexually abused by the Plaintiff to CHR and that a request for relief from a governmental agency does not constitute state action.

She also argues that CHR made no move to intervene in the situation until a third party reported that B.H. had been sexually abused.

Additionally, Melisa argues that the Plaintiff has failed to demonstrate that the post-deprivation hearing he was afforded was insufficient to provide sufficient due process, a requirement of a Section 1983 claim. Melisa contends that the Plaintiff has failed to demonstrate that any harm resulted from the denial of a pre-deprivation hearing, based upon Zinermon v. Burch, 494 U.S. 100 (1990), which holds that when a predeprivation hearing would be unduly burdensome in proportion to the liberty interest at stake a post-deprivation hearing may satisfy due process.

Finally, Melisa asserts that Hoffman has failed to show that KRS 620.060(1) is unconstitutional, but argues that even if the statute is unconstitutional it is inapplicable because she acted only as a parent in reporting the alleged abuse and did not act pursuant to KRS 620.060 or any other statute. As support, Melisa cites the unpublished opinion of Federal District Judge William Bertelsman, in Marksberry v. Campbell County Fiscal Court, No. 86-12 (E.D.Ky. Dec. 8, 1986) (order denying summary judgment).

2. Response

In his Response, the Plaintiff argues that Melisa jointly engaged in unconstitutional acts with state actors West and Harris and therefore acted under color of state law for purposes of this § 1983 action. In support of this argument, Plaintiff relies on the holdings of Lugar v.

Edmondson Oil Co., 457 U.S. 922 (1982), In re Jackson Lockdown/MCO Cases, 568 F.Supp. 869 (E.D.Mich.S.D. 1983), Heitmanis v. Austin, 899 F.2d 521 (6th Cir. 1990) and Duncan v. Peck, 752 F.2d 1135 (6th Cir. 1985).

The Plaintiff further argues that because the state could feasibly have provided a predeprivation hearing which would not have been unduly burdensome in light of the Plaintiff's interest at stake, he was entitled to a predeprivation hearing. Plaintiff relies on Zinermon, *supra*, to support his contention that the availability of a post-deprivation is irrelevant to the Plaintiff's due process right to a predeprivation hearing.

Finally, the Plaintiff argues that KRS 620.060(1) is unconstitutional because it does not require the court to make inquiry into whether a predeprivation hearing is feasible under the particular circumstances of the case.

3. Discussion

There are two elements that must be proved to constitute a viable action under 42 U.S.C. §1983. An individual must first show that he or she has been deprived of a right secured by the Constitution and laws of the United States. Secondly, he or she must show that the defendant or defendants acted "under color of any statute," 42 U.S.C. §1983, of the relevant state in depriving the right in question. In Flagg Brothers Inc. v. Brooks, 436 U.S. 149, 156 (1978), the Court stated that "most rights secured by the Constitution are protected only against infringement by governments."

It is well-settled that Section 1983 was enacted to protect individuals against the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Monroe v. Pape, 365 U.S. 167, 184 (1961).

In Lee v. Patel, 564 F.Supp. 755 (E.D.Va. 1983), a tenant brought an action against a landlord and magistrate, alleging the two had violated his constitutional rights under color of state law by virtue of the landlord swearing out a warrant for the tenant's arrest. The court held:

> If a citizen who has been a victim of a crime, or believes himself to be the victim of a crime, is engaged in State action under color of State law when he swears out a warrant, then he is also engaged in State action when he drives on the right hand side of the highway, or pays his State taxes, or conveys title to an automobile through the State Division of Motor Vehicles, or records the deed to his property, obtains a marriage license, or probates his will. Most everything we do in our intercourse with others we do by virtue of or under authority of State law.

Id. at 760-61.

In Martin v. Supreme Court of State of N.Y., 644 F.Supp. 1537, 1543 (N.D.N.Y. 1986), the court stated: "It is well established that a private actor's employment of available statutory remedies does not convert such private action into action of the state."

As the Patel court points out, taking the Plaintiff's position to its extreme, would make each and every citizen a state actor by virtue of dozens of daily *interactions* with the state.

The Court is of the opinion that Melisa did not become a state actor when she contacted the Cabinet for Human Resources to relate her concerns that her daughter had been and was in danger of being sexually abused.

Therefore, summary judgment in favor of Melisa Hoffman should and shall be granted.

B. Motion of Defendants West, Harris and Commonwealth of Kentucky for Summary Judgment

1. Motion

The Defendants West and Harris claim that they are entitled to absolute immunity from suit and therefore cannot be liable for any action which the Plaintiff has alleged as grounds for his Section 1983 action. The Defendants argue that despite the style of the complaint against them, alleging they acted individually as well as officially, the Plaintiff has made no allegation of acts or omissions committed outside the scope of their official duties. Defendants Harris and West argue that in their official capacities they are entitled to absolute immunity as they were performing a quasi-prosecutorial function, citing Salyer v. Patrick, 874 F.2d 374 (6th Cir. 1989).

The Defendant CHR argues that it has Eleventh Amendment protection and is immune from liability for damages. It further argues that CHR is not a "person" for purposes of Section 1983.

Further, the Defendants contend that the Plaintiff has made no showing that the post-deprivation hearing was inadequate to protect the Plaintiff's due process rights. They argue that courts have allowed officials to temporarily deprive a parent of custody in emergency situations without benefit of the other parent's consent or a court order, thus no violation could have occurred here where there was in fact the consent of the other parent and a court order.

Defendants next argue that the Plaintiff has not established a causal connection between the failure of a pre-deprivation hearing and Hoffman's injury. Defendants contend that at a post-deprivation hearing, probable cause

was found that Plaintiff sexually abused his daughter. Citing Lossman v. Pekarske, 707 F.2d 288 (7th Cir. 1983), the Defendants argue that to show an injury, a plaintiff must demonstrate that a pre-deprivation hearing would have prevented the deprivation, which Defendants argue the Plaintiff cannot show.

As to the Plaintiff's substantive due process claim, the Defendants argue that they engaged in no conduct which "shocks the conscience," a necessary element to such a claim.

Finally, the Defendants argue that the challenged state statute, KRS 620.060, bears a presumption of constitutionality and the Court should exercise restraint prior to making a determination of constitutional deficiency.

2. Response

Plaintiff argues that no discovery has yet been taken in this action, therefore there are no "facts" in the record. Thus, the Plaintiff argues, material issues of fact exist precluding the entry of summary judgment.

The Plaintiff counters the Defendants' claim of absolute immunity, citing Hafer v. Melo, 502 U.S. ___, 116 L.Ed.2d 301 (1991), which holds that state officials are personally liable for damages in a Section 1983 case based on official acts if the action is brought against them in their individual capacities. Further, the Plaintiff argues that the Defendants are not absolutely immune from liability as KRS 620.040(1) does not authorize CHR workers to undertake any prosecutorial action. Plaintiff argues that the statute contemplates that CHR will contact law enforcement or prosecutors' offices, allowing one of those entities to undertake prosecution, rather than the CHR workers initiating it. Plaintiff alleges that the Defendants Harris and West did not have probable cause to believe that B.H. was being abused, the fact that a magistrate or judge issued a

warrant based upon less than probable cause does not insulate those seeking the warrant.

Plaintiff argues that the Defendants Harris and West do not have qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982), which holds that there is no qualified immunity for an official who violates clearly established constitutional rights of which a reasonable person would have known. Plaintiff argues that Harris and West should have reasonably known that he was entitled to a pre-deprivation hearing and that such a hearing was feasible.

Hoffman asserts that he is seeking no money damages from CHR, but only injunctive relief which is not barred by the Eleventh Amendment.

As to the adequacy of the post-deprivation hearing, the Plaintiff states that because a pre-deprivation hearing was feasible and not unduly burdensome, his due process rights were violated. He cites Zinermon v. Burch, 494 U.S. 113 (1990), which establishes the standards by which the adequacy of a post-deprivation hearing is evaluated for due process purposes and argues that this standard was not met in his circumstances.

Plaintiff argues that his substantive due process claim is based upon his "fundamental" liberty right to custody of his child, rather than upon conduct which "shocks the conscience."

Finally, Plaintiff contends that KRS 620.060 is presumptively unconstitutional because it deprives persons of protected interests via an *ex parte* action of the State. The Plaintiff argues that the Zinermon standard, whereby a pre-deprivation hearing must be held if feasible, is ignored by this statute which does not require the Court to even inquire if a pre-deprivation hearing is feasible. The Plaintiff also asserts that the standard of proof for deprivation of

custody, "reasonable grounds to believe," is too low in light of the liberty interest involved.

Defendants assert in their Reply that the Plaintiff has not pled and cannot show that he had a clearly established right to unsupervised visitation. Citing Scrivner v. Andrews, 816 F.2d 261 (6th Cir. 1987), Defendants argue that parents has no enforceable right to "meaningful visitation," therefore the Plaintiff has suffered no due process violation.

Defendants also counter the Plaintiff's argument that they are not authorized to perform quasi-prosecutorial functions, citing Salyer v. Patrick, *supra*.

3. Motion to Strike or in the Alternative, Reply of Defendants Harris, West, Commonwealth of Kentucky and CHR

Defendants seek an order striking the Plaintiff's Response to their Motion for Summary Judgment in whole or in part, arguing that certain statements made in the Response are inflammatory, prejudicial, impertinent and scandalous.

Essentially, the Defendants argue that the Plaintiff's recitation of "facts" is incorrect and inflammatory. They contend that any reference to Hoffman's arrest and criminal prosecution for sex abuse charges is irrelevant to this civil action. Citing no case law, but nominally pursuant to Fed.R.Civ.P. 12(f), they seek to have his Response stricken or edited by the Court.

The Plaintiff filed a Response to the Motion to Strike, arguing that Rule 12(f) refers only to "pleadings" and "pleadings" are defined under Fed.R.Civ.P. 7(a) as the complaint, answer, reply to counterclaim, answer to cross-claim, a third party complaint and a third party answer.

Courts have widely held that a motion to strike is not favored and is usually denied unless language in the pleading has no possible relation to the controversy. See Chiropractic Co-op Ass'n of Michigan v. American Medical Ass'n, 617 F. Supp. 264 (D.C. Mich. 1985). Further, the purpose behind Rule 12(f) is to allow a party to move to strike affirmative defenses, most often asserted in an answer or counterclaim. Several courts have held that Rule 12(f) does not apply to motions, see Krass v. Thomson-CGR Medical Corp., 665 F.Supp. 844 (N.D.Cal. 1987).

The matters objected to are asserted in the Plaintiff's statement of the facts. This section of the Plaintiff's Response is preceded by a disclaimer as to the accuracy of the events and dates asserted. Further, the Defendants seek to strike portions of the Plaintiff's Response to Defendants' Summary Judgment motion, the type of motion which is not contemplated as a "pleading" for purposes of Rules 7(a) or 12(f). Therefore, the Defendants' Motion to Strike must be denied.

4. Discussion of Summary Judgment Motion

a. Immunity of Harris and West

In Salyer v. Patrick, *supra*, the Sixth Circuit addressed the issue of whether family service workers are immune from § 1983 liability for investigating and filing abuse petitions.

The Salyer court determined that workers were "absolutely immune from liability in filing the juvenile abuse petition, due to their quasi-prosecutorial function in the initiation of the child abuse proceedings." Id. at 378; accord Meyers v. Contra Costa County Dep't of Social Services, 812 F.2d 1154, 1157 (9th Cir. 1987), *cert. denied*, 484 U.S. 829 (1987). The court reasoned that the social workers were acting as prosecutors in bringing the child before the court.

However, the court did not reach the question of whether the social workers were entitled to absolute immunity in conducting the investigation. That issue was resolved by the Sixth Circuit in Achterhof v. Selvaggio, 886 F.2d 826 (6th Cir. 1989), wherein the court concluded that a social worker who begins an *investigation* of alleged child abuse is entitled only to qualified immunity. The court differentiated between those acts which are "intimately associated with the judicial process . . . and duties which are administrative or investigatory." Id. at 829. Absolute immunity applies only to the former.

The Achterhof court concluded that the social worker's action in investigating an allegation of child abuse was mandated by statute and therefore "an administrative function not intimately related with the judicial process."

Plaintiff Hoffman's Complaint alleges Defendants Harris and West committed the following overt acts:

1) [That they] "invoked the provisions of KRS 620.060(1) to achieve the substantial deprivation of Plaintiff's constitutionally protected liberty interest . . ."

2) That . . . at the behest of West and Defendant, Hoffman, Harris, testified by Affidavit or sworn testimony to the Fayette District Court that [Ian Hoffman was allegedly sexually abusing a child]."

These allegations, taking them in the light most favorable to the Plaintiff, specify overt actions which are an initiation of the judicial process. The filing of an Affidavit in court is an activity intimately associated with the judicial process. Therefore, none of the allegations in the Complaint protest of *investigatory* activity undertaken by Harris and West. The Plaintiff appears to concede that he is not asserting that Harris and West infringed his rights via investigatory activity.

Rather, he contends that under KRS 620.040(1), the functions of CHR and its social workers are wholly investigatory and that Harris and West were acting outside the scope of their duties by initiating court proceedings. Therefore, Hoffman contends, they are not entitled to any immunity, citing Imbler v. Pachtman, 424 U.S. 409 (1976). Plaintiff further argues that the Salyer case is not on point because KRS 620.040 was amended after that decision.

KRS 620.040(1), amended with an effective date of July 13, 1990, states, in pertinent part:

> Upon receipt of a report alleging abuse . . . by a parent . . . the recipient of the report shall forthwith notify the cabinet [CHR] or its designated representative. . . . The cabinet shall investigate the matter immediately and within forty-eight hours . . . make a written report to the Commonwealth's or county attorney and the local enforcement agency or Kentucky State Police concerning the action which has been taken on the matter.

The earlier version of the statute, in effect at the time the underlying facts occurred which are considered in Salyer, states as follows:

> Upon receipt of a report [of abuse] the county attorney, the Commonwealth's attorney, the local law enforcement agency or Kentucky state police, if they are the recipients of the report, shall forthwith notify the cabinet or its designated representative and the Commonwealth or county attorney of the receipt of the report and its contents and, if the report alleges abuse, they shall investigate the matter and within forty-eight (48) hours make a written report to the

> cabinet or its designated representative and the Commonwealth or county attorney concerning the action which has been taken on the matter.

If anything, the earlier statute is more restrictive of cabinet social workers than the current version. Despite a stricter standard, however, the Salyer court ruled that social workers initiating judicial action were entitled to absolute immunity. Therefore, Plaintiff's argument that Salyer is not on point is unpersuasive.

In Imbler, *supra*, the Court set forth the public policy considerations underlying the necessity of absolute immunity for prosecutors defending themselves against a civil action under §1983.

> If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious action to the State's advocate.

Id. at 424-25.

The Court is of the opinion that Defendants Harris and West were not acting outside the scope of their duties as CHR employees hired to protect the interests of

neglected and abused children. The Sixth Circuit has previously determined that such workers are absolutely immune from §1983 liability when engaged in quasi-prosecutorial acts, such as filing a petition with the court for a hearing. The Court finds that Salyer is controlling precedent for the decision to be made herein, and that based upon that case and the facts outlined above, the Defendants West and Harris are entitled to summary judgment on the Plaintiff's claim for damages under §1983 as they are absolutely immune for the acts alleged in the Plaintiff's complaint.

b. Immunity of CHR

The Defendants argue that the Plaintiff is not entitled to money damages from CHR or the Commonwealth of Kentucky as such a claim is barred by the Eleventh Amendment. The Plaintiff does not dispute this, and asserts that he seeks only declaratory and injunctive relief against CHR.

The Eleventh Amendment is an "explicit limitation on federal judicial power, . . . (and) a federal court is without jurisdiction to hear a claim against an unconsenting state absent congressional abrogation." Cowan v. University of Louisville School of Medicine, 900 F.2d 936 (6th Cir. 1990) (citations omitted).

The Court noted in Kentucky v. Graham, 473 U.S. 159 (1985) that

> [u]nless a State has waived its Eleventh Amendment immunity or Congress has overridden it, however, a State cannot be sued directly in its own name regardless of the relief sought. Thus, implementation of state policy or custom may be reached in

> federal court only because official-capacity actions for prospective relief are not treated as actions against the State.

Id. at 167, n. 14. (citations omitted).

Through his complaint, the Plaintiff seeks declaratory and/or injunctive relief against the Commonwealth of Kentucky, CHR and its officers and agents, asserting that these entities

> ought to be mandatorily enjoined from undertaking to deprive, or depriving Plaintiff of his constitutionally protected liberty interest in physical custody of his infant child, B.H.; further [the Commonwealth of Kentucky and CHR] ought to be mandatorily enjoined from invoking the ex parte provisions of KRS 620.060(1), or otherwise undertaking to deprive, or depriving Plaintiff of his constitutionally protected liberty interest in physical custody of his infant child, B.H., without affording Plaintiff the requisite due process required by the 14th Amendment to the U.S. Constitution, including but not limited to, a pre-deprivation hearing . . .

Plaintiff asserts that the decisions of the Supreme Court do not preclude a §1983 injunctive and/or declaratory action against a state or state agency, citing Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989). Therein, the Court states that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because 'official-capacity actions for *prospective* relief are not treated as actions against the State.'" Id. at (sic)

However, in Alabama v. Pugh, 438 U.S. 781 (1978), the Court reversed a federal district court's issuance of an injunction against the State of Alabama and the Alabama Board of Corrections. The Court held that "[t]here can be no doubt . . . that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit." Id. at 782.

Moreover, the Plaintiff's reliance upon Will for the proposition that a State may be sued for injunctive relief is unfounded. Will merely recognizes that an "official-capacity" action, that is an action against a *state officer* in his or her official capacity, is not barred by the Eleventh Amendment. It does not alter the Court's holding in Pugh v. Alabama, (sic) *supra*, that the Eleventh Amendment protects a State from all types of suits absent state consent or congressional abrogation of immunity.

Therefore, the Motion of Defendants Commonwealth of Kentucky and CHR for summary judgment must be granted and the Plaintiff's claims against them dismissed.

c. Constitutionality of KRS 620.060(1)

The Supreme Court has consistently reaffirmed the principle that courts have a duty to avoid deciding a constitutional issue if the case may be disposed of on non-constitutional grounds. See Escambia County v. McMillan, 466 U.S. 48 (1984) (per curiam), on remand 748 F.2d 1037 (11th Cir. 1984). Due to the Court's findings as outlined above, this case is properly disposed of on non-constitutional grounds; therefore this Court need not reach the issue of the constitutionality of KRS 620.060(1).

d. Additional Arguments

As this case will decided on the grounds discussed above, the Court need not and shall not reach the additional

arguments made by Defendants in favor of summary judgment.

VI. CONCLUSION

For the reasons outlined above, the Defendants' Motions for Summary Judgment shall be granted and this action dismissed. An Order consistent with this Memorandum Opinion shall be issued contemporaneously.

This 25th day of June, 1992.

/s/ Karl S. Forester

KARL S. FORESTER, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-526

IAN HOFFMAN, PLAINTIFF

V. ORDER

TAMMY D. HARRIS, et.al., DEFENDANTS

* * * * *

In conjunction with the Memorandum Opinion issued on the same date herewith, IT IS HEREBY **ORDERED** that the Plaintiff's Motion to Dismiss the Counterclaim of Melisa Q. Hoffman is **GRANTED**.

This 5th day of February, 1992.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

Eastern District of Kentucky
FILED
FEB -5 1992
AT LEXINGTON
LESLIE G. WHITMER
CLERK: U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-526

IAN HOFFMAN, PLAINTIFF

V. MEMORANDUM OPINION

TAMMY D. HARRIS, et.al., DEFENDANTS

* * * * *

I. INTRODUCTION

This matter comes before the Court on the Motion of the Plaintiff, Ian Hoffman, to Dismiss the Counterclaim of Defendant, Melisa Q. Hoffman, under F.R.Civ.P. 12(b)(6). The Defendant has responded and the matter is now ripe for review by the Court.

II. FACTUAL BACKGROUND

Ian Hoffman brought suit under 42 U.S.C. §1983, alleging the Defendants, including Melisa Hoffman, acted under color of state law to deprive him of his constitutionally protected liberty interest in physical custody of his child. Melisa Hoffman answered the complaint and counterclaimed, alleging that the Section 1983 suit was

brought against her as harassment and for purely malicious purposes.

III. MOTION TO DISMISS

As grounds for his Motion to Dismiss the Counterclaim, Ian Hoffman states that Melisa Hoffman's claim for intentional infliction of emotional distress fails to state a claim for which relief can be granted. Ian Hoffman argues that the conduct of which Melisa Hoffman complains, the filing of this Section 1983 lawsuit, is not conduct which exceeds the bounds tolerated by society. Further, Ian Hoffman argues that a malicious prosecution claim cannot stand until the underlying litigation is completed.

Melisa Hoffman responds that her counterclaim is not based on malicious prosecution, but solely on intentional infliction of emotional distress. Melisa Hoffman argues that Ian Hoffman's actions are outrageous because he was not denied due process, but in fact was given a post-deprivation hearing during which it was determined that he had sexually abused their child. She also contends that Ian Hoffman's action in filing suit against her under Section 1983 is outrageous because she is a private citizen incapable of acting under color of state law.

IV. STANDARDS FOR DISMISSAL

In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court will look principally to the pleadings. See Innovative Digital Equipment v. Quantum Technology, 597 F.Supp. 983 (1984). Under F.R.Civ.P. 8(a)(2), the standard for a well-pleaded complaint is that it "shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and whether relief can be granted on such a claim."

As the Innovative Digital Equipment court held:

> the question is whether the Complaint with all the well-pleaded material facts taken as true and construed in the light most favorable to the plaintiff sets forth facts sufficient to state a legal claim.

597 F.Supp. at 987.

V. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The substantive aspects of Melisa Hoffman's counterclaim are, in full,

> 1. Defendant, Melisa Q. Hoffman filed this counterclaim against Plaintiff as a tort of emotional outrage. Plaintiff and this Defendant are still under the jurisdiction of the Fayette circuit Court in an action to determine the custody of the parties (sic) minor child. Plaintiff's action herein has been purposefully and maliciously taken to intimidate and harrass (sic) this Defendant and cost her severe emotional harm as well (sic) to prejudice the Fayette Circuit Court.
>
> 2. That by reason of Plaintiff's action, this Defendant/Counterclaimant has suffered mental anguish, stress, humiliation and embarrassement (sic), all to her damage in the amount of $50,000.00 which sum this Counterclaimant ought to recover of the Plaintiff.

Answer of Def. Melisa Q. Hoffman and Countercl., p. 3.

In Kentucky, the tort of "emotional outrage" or "intentional infliction of emotional distress" was first recognized in the case of Craft v. Rice, Ky., 671 S.W.2d 247 (1984). Therein, the Supreme Court of Kentucky

adopted the *Restatement (Second) of Torts* § 46, which provides as follows:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

In Humana of Kentucky, Inc. v. Seitz, Ky., 796 S.W.2d 1 (1990), the court considered a case in which a patient who gave birth to a stillborn fetus filed suit against the hospital, claiming the nursing staff's insensitive conduct constituted intentional infliction of emotional distress. The Plaintiff alleged that during her labor one of the nurses ordered her to "shut up" because she was disturbing the other patients. She also alleged that after the doctor arrived and pronounced the baby dead, one of the nurses wrapped the deceased baby in a sheet and told her, "Honey, we dispose of them right here at the hospital." 796 S.W.2d at 2.

The Kentucky Supreme Court found that the defendants were entitled to summary judgment on the claim of intentional infliction of emotional distress. The court set forth the elements of proof necessary to maintain such a cause of action.

1) the wrongdoer's conduct must be intentional or reckless;
2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;

3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and
4) the emotional distress must be severe.

796 S.W.2d at 2-3.

In rejecting the Seitz plaintiff's claim, the court relied on Comment d to Section 46 of the *Restatement (Second) of Torts*, which states that "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

In the case of Hayes v. Bakery Confectionery & Tobacco Wkrs, 753 F.Supp 209 (W.D.Ky. 1989), *aff'd* 914 F.2d 256, the court considered the claim of a factory worker who was discharged for fighting with a co-worker on company property. He filed suit against the company for terminating his employment and against his union for its failure to take the matter to arbitration on his behalf. The court found the plaintiff's claim of intentional infliction of emotional distress untenable, holding that the right to recover for this tort "is a rather extraordinary one and must spring from conduct which is so extreme as to go beyond all possible bounds of decency . . ." 753 F.Supp. at 215. Furthermore, the court held that "even if conduct is extreme and outrageous, the actor is never liable where he has done no more than to insist upon his legal rights in a permissible way." Id.

VI. DISCUSSION

Upon examination of the counterclaim of Melisa Hoffman in light of the relevant case law, it is clear that the

Plaintiff's Motion to Dismiss must be granted.

The counterclaim merely states that Ian Hoffman's action has been "purposefully and maliciously taken to intimidate and harrass (sic)" Melisa Hoffman. Applying the standard set forth by the court in Innovative Digital Equipment v. Quantum Technology, 597 F.Supp 983, 987 (N.D.Ohio 1984), it is evident that Melisa Hoffman has failed to "set forth facts sufficient to state a legal claim."

Under Kentucky law, a plaintiff must show conduct that is so outrageous as to be beyond all bounds tolerated by a civilized society. In our society, the filing of a lawsuit to vindicate rights and settle disputes is among the most civilized methods of resolving differences. Only in the most extreme situation could such an action be termed "beyond all possible bounds of decency." *Restatement (Second) of Torts*, § 46, Comment d. Such is not the situation herein.

VII. CONCLUSION

Therefore, the Plaintiff's Motion to Dismiss the Counterclaim must be granted. An order consistent with this Memorandum Opinion will be issued on the same date herewith.

This 5th day of February, 1992

/s/ Karl S. Forester

KARL S. FORESTER, JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

IAN HOFFMAN — PLAINTIFF

v. — COMPLAINT — NO. 91-526

TAMMY D. HARRIS, Individually,
COLLEEN WEST, Individually,
MELISA Q. HOFFMAN, Individually,
and COMMONWEALTH OF KENTUCKY,
CABINET FOR HUMAN RESOURCES — DEFENDANTS

* * * * * *

Serve pursuant to Fed.R.Civ.P. 4:
TAMMY D. HARRIS, Individually
627 West Fourth Street
Lexington, Kentucky 40508

COLLEEN WEST, Individually
627 West Fourth Street
Lexington, Kentucky 40508

MELISA Q. HOFFMAN, Individually
126 St. James Drive
Lexington, Kentucky

COMMONWEALTH OF KENTUCKY,
CABINET FOR HUMAN RESOURCES
Attorney General
116 The Capitol Building
Frankfort, Kentucky 40601

* * * * * *

Comes the Plaintiff, Ian Hoffman, for his Complaint herein, and states:

JURISDICTION

1. That jurisdiction of Plaintiff's claim against the Defendants is conferred upon this Court under 28 U.S.C. §1343(a)(3) and (4), which gives District Courts jurisdiction over actions commenced to redress the deprivation, under color of state law, of rights secured by the Federal Constitution or by Acts of Congress; Plaintiff's claim herein arises under 42 U.S.C. §1983, an Act of Congress protecting Federal Constitutional rights;

VENUE

2. That venue of this action is governed by 28 U.S.C. §1391(b); that all Defendants are residents of the U.S. Judicial District for the Eastern District of Kentucky;

3. That all of the acts complained of herein occurred in Fayette County, Kentucky;

4. That Plaintiff, Ian Hoffman ("Plaintiff"), is resident of Lexington, Kentucky;

5. That Defendant, Tammy D. Harris ("Harris"), is a resident of the Commonwealth of Kentucky and at all relevant times herein was acting in her capacity as an employee of the Commonwealth of Kentucky, Cabinet for Human Resources;

6. That Defendant, Colleen West ("West"), is a resident of the Commonwealth of Kentucky and at all

relevant times herein was acting in her capacity as an employee of the Commonwealth of Kentucky, Cabinet for Human Resources;

7. That Defendant, Melisa Q. Hoffman ("Defendant, Hoffman"), is a resident of the Commonwealth of Kentucky

8. That Defendant, Commonwealth of Kentucky, Cabinet for Human Resources, is an agency of state government of the Commonwealth of Kentucky;

9. That 42 U.S.C. §1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

10. That Defendants are "persons" within the meaning of §1983;

11. That Defendants' acts complained of herein were undertaken under color of statute, ordinance, regulation, custom, or usage of the Commonwealth of Kentucky;

12. That Defendants subjected Plaintiff, a citizen of the United States, or caused Plaintiff to be subjected to the deprivation of rights, privileges or immunities secured by the U.S. Constitution;

13. That the Defendants acted in concert to deprive Plaintiff of his rights as set out herein; that Harris and West are state officers with whom Defendant, Hoffman, acted jointly to deprive Plaintiff of his constitutionally protected liberty right mentioned herein; that Defendant, Hoffman, is a state actor and acted under color of state law by reason of having acted together with and having obtained significant aid from Harris and West in effecting the deprivation of Plaintiff's liberty interest mentioned herein;

14. That Defendants invoked the provisions of KRS 620.060(1) to achieve the substantial deprivation of Plaintiff's constitutionally protected liberty interest mentioned herein;

15. That KRS 620.060(1) provides:

> The court for the county where the child is present may issue an ex parte emergency custody order when it appears to the court that there are reasonable grounds to believe, as supported by affidavit or by recorded sworn testimony, that the child is in danger of imminent death or serious physical injury or is being sexually abused and that the parents or other person exercising custodial control or supervision are unable or unwilling to protect the child. Custody may be placed with a relative taking into account the wishes of the custodial parent or any other appropriate person or agency including the cabinet.

16. That the conduct of the Defendants complained of herein arose both from the absence of a specific requirement in KRS 620.060(1) that Plaintiff be afforded a pre-deprivation hearing before being deprived of his liberty interest mentioned herein, as well as the failure of

Defendants to see that no deprivation of Plaintiff's constitutionally protected liberty interest occurred without adequate procedural protections, notwithstanding the absence of any such safeguards being prescribed by KRS 620.060(1);

17. That KRS 620.060(1) is procedurally defective under the Due Process Clause of the 14th Amendment to the U.S. Constitution;

18. That on or about November 16, 1990, acting jointly and at the behest of West and Defendant, Hoffman, Harris, testified by Affidavit or sworn testimony to the Fayette District Court that the following facts were true:

> Child is allegedly being sexually abused by father Ian Hoffman. Parents are separated and father is to have a visit with this child on 11-16-90. Father was found by C.H.R. to have sexually abused older sibling . . . age 6 in June 1990.

that any suggestion that Plaintiff was sexually abusing his infant child (or her older sibling) was false, and Defendants had no reasonable basis to believe otherwise;

19. That such conduct of Defendants was undertaken for the purpose of depriving Plaintiff of his constitutionally protected liberty interest in physical custody of his infant child, B. H.;

20. That by reason of such conduct of Defendants Plaintiff was deprived of his constitutionally protected liberty interest in the physical custody of his infant child, B. H., on November 16, 1990, and thereafter, without due process, and in violation of Plaintiff's substantive and procedural due process rights, as guaranteed by the 14th Amendment to the United States Constitution;

21. That Defendants accomplished such deprivation

of Plaintiff's liberty interest, as aforesaid, without benefit of a pre-deprivation hearing as required by the 14th Amendment to the United States Constitution;

22. That the Defendants could have feasibly provided a pre-deprivation hearing before depriving Plaintiff of his liberty interest, as aforesaid, but did not do so;

23. That a pre-deprivation hearing would not have been unduly burdensome in proportion to the liberty interest of Plaintiff which was at stake;

24. That Defendants had no reasonable grounds to believe that Plaintiff's infant child, B.H., was in danger of imminent death or serious physical injury or was being sexually abused by Plaintiff, and that the parents or other person exercising custodial control or supervision was unable or unwilling to protect Plaintiff's infant child, B. H.;

25. That Defendants had no evidence before depriving Plaintiff of his liberty interest, as aforesaid, upon which, when measured by an objective standard, a reasonable social officer could have reasonably believed that Plaintiff's infant child, B. H., was being sexually abused by Plaintiff;

26. That measured by an objective standard, a reasonable social worker could not have believed, based on the information possessed by Defendants, when undertaking to deprive Plaintiff of his liberty interest, as aforesaid, that reasonable cause existed sufficient to obtain the Order of the Fayette District Court on November 16, 1990, so as to deprive Plaintiff of such liberty interest on that date, and thereafter:

27. That as a direct result of the foregoing, Plaintiff was damaged by deprivation of his constitutional rights, as mentioned herein;

28. That by reason of the Defendants' actions, Plaintiff has suffered mental anguish, humiliation, mortification, and embarrassment, all to his damage in the amount of One Hundred Thousand and 00/100 ($100,000.00)Dollars, which sum Plaintiff ought to recover of Defendants, Harris, West and Hoffman, and each of them;

29. That by reason of the unconstitutional conduct of Defendants complained of herein, Plaintiff incurred attorneys' fees and other expenses in the amount of Fifteen Thousand and 00/100($15,000.00)Dollars to contest such conduct, and that by reason thereof Plaintiff ought to recover the amount of Fifteen Thousand and 00/100 ($15,000.00) Dollars of Defendants, Hoffman, Harris and West, and each of them;

30. That Defendants, Harris, West and Hoffman, in their individual capacities, acted in disregard of Plaintiff's federally protected rights and/or were motivated by evil motive or intent, and that by reason thereof, Plaintiff should recover punitive damages from Defendants, Harris, West and Hoffman, and each of them, in the amount of Fifty Thousand and 00/100 ($50,000.00) Dollars;

31. That Defendant, Commonwealth of Kentucky, Cabinet for Human Resources, its officers, agents, servants, employees, and attorneys ought to be mandatorily enjoined from undertaking to deprive, or depriving Plaintiff of his constitutionally protected liberty interest in physical custody of his infant child, B.H.; further, Defendant, Commonwealth of Kentucky, Cabinet for Human Resources, its officers, agents, servants, employees, and attorneys ought to be mandatorily enjoined from invoking the ex parte provisions of KRS 620.060(1), or otherwise undertaking to deprive, or depriving Plaintiff of his constitutionally protected liberty interest in physical custody of his infant child, B.H., without

affording Plaintiff the requisite due process required by the 14th Amendment to the U.S. Constitution, including but not limited to, a pre-deprivation hearing;

32. That by reason of the Defendants' deprivation of Plaintiff's constitutional rights complained of herein, and the relief sought by Plaintiff herein, Plaintiff should recover his costs, including reasonable attorneys fees incurred herein, pursuant to 42 U.S.C. §1988;

33. That Plaintiff demands a TRIAL BY JURY;

WHEREFORE, Plaintiff, Ian Hoffman, demands:

1. Judgment pursuant to 28 U.S.C. §2201, declaring that the Defendants, by their actions, have violated Plaintiff's constitutional rights;

2. Judgment in the amount of One Hundred Thousand and 00/100 ($100,000.00) Dollars, against Defendants, Hoffman, Harris and West, and each of them, as compensatory damages;

3. Judgment in the amount of Fifteen Thousand and 00/100 ($15,000.00) Dollars, against Defendants, Hoffman, Harris and West, and each of them, as attorneys fees incurred in contesting Defendants' unconstitutional conduct;

4. Judgment in the amount of Fifty Thousand and 00/100 ($50,000.00) Dollars, against Defendants, Hoffman, Harris and West, and each of them, as punitive damages;

5. Entry of a mandatory injunction against Defendant, Commonwealth of Kentucky, Cabinet for Human Resources, as sought herein above;

6. Judgment against all Defendants awarding him his costs and disbursements expended herein, including a reasonable attorney's fees pursuant to 42 U.S.C. §1988;

7. A TRIAL BY JURY;

8. Any and all other relief to which he may appear entitled.

William C. Jacobs
Catherine M. Stevens
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2464

BY: /s/ W. C. Jacobs
ATTORNEYS FOR PLAINTIFF

VERIFICATION

I hereby verify that the foregoing is true to the best of my knowledge, information, and belief.

/s/ Ian Hoffman
IAN HOFFMAN

STATE OF KENTUCKY)
)
COUNTY OF FAYETTE)

The foregoing Complaint was subscribed and sworn to before me by Ian Hoffman on this the 14th day of November, 1991.

My Commission expires: June 13, 1993.

/s/ Rheba C. McClellan
NOTARY PUBLIC

No. 93-1044

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

IAN HOFFMAN - - - - - - - Petitioner

versus

TAMMY D. HARRIS, Individually,
COLLEEN WEST, Individually,
MELISA HOFFMAN, Individually,
COMMONWEALTH OF KENTUCKY,
CABINET FOR HUMAN
RESOURCES - - - - - - - Respondents

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANGELA M. FORD
General Counsel
STANLEY A. STRATFORD
Deputy Counsel
HEATHER M. MCKEEVER
Counsel of Record
Department of Law
Cabinet for Human Resources
275 East Main Street – 4 West
Frankfort, Kentucky 40621
Telephone: (502) 564-7900
Counsel for Respondents

February 28, 1994

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY.

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IN THE

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v.

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COLLEEN WEST, Individually,
MELISA HOFFMAN, Individually,
COMMONWEALTH OF KENTUCKY, CABINET FOR
HUMAN RESOURCES - - - - - - - *Respondents*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents Tammy D. Harris, Colleen West, and the Commonwealth of Kentucky, Cabinet for Human Resources, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit rendered September 21, 1993, in Case No. 92-6161. The Memorandum Opinion of the Court is not recommended for full text publication.

I. COUNTERSTATEMENT OF THE CASE

This is a §1983 action in which the Petitioner, Ian Hoffman, (hereinafter "Hoffman") alleges that his 14th Amendment liberty interests were violated. Specifically, the Cabinet for Human Resources (hereinafter "the Cabinet"), obtained an emergency *ex parte* order to prevent Hoffman from having unsupervised visitation with his infant daughter. A Cabinet employee, Tammy D. Harris, sought an order pursuant to KRS 620.060(1), alleging that Hoffman sexually abused the child. Hoffman claims that the Cabinet and the Department for Social Services employees acted unlawfully in filing an Affidavit with the Fayette County District Court. A post-deprivation hearing was held in which the allegations were substantiated. Thereafter, Hoffman was allowed supervised visitation with the child.

REASONS FOR DENYING THE WRIT

I. An Action Naming the Commonwealth of Kentucky, Cabinet For Human Resources, as Defendant in a 42 U.S.C. §1983 Claim is Barred by the Eleventh Amendment.

The Cabinet is not subject to suit by the Petitioner. A state agency may not be sued in federal court, regardless of the relief sought, unless the state has waived its sovereign immunity under the Eleventh Amendment to the U.S. Constitution, or Congress has overridden it. *Alabama* v. *Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 3057-8, 57 L.Ed.2d 1114 (1978). There is no allegation that Kentucky has waived its Eleventh Amendment immunity in this case, and it is well settled that by enacting 42 U.S.C. §1983 Congress did not abrogate the Eleventh Amendment immunity of any state. *Quern* v. *Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 1143-5, 59 L.Ed.2d 358 (1979). *Will* v. *Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 2309, 105 L.Ed.2d 45 (1989). Moreover, states and state agencies are not "persons" subject to §1983 liability.

In addition, had the Petitioner sought relief against the Cabinet by naming state officials in their official capacity, the same Eleventh Amendment would have been asserted. *Kentucky* v. *Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). In *Will* v. *Michigan Dept. of State Police*, 491 U.S. at 71, the United States Supreme Court held "that neither a state nor its officials acting in their official capacities are 'persons' under §1983."

Regardless, Petitioner did not sue a state official in her official capacity. Petitioner's admitted deficiencies in pleading cannot be corrected or amended by language in a petition. Deficiencies can only be amended by the filing of an amended pleading, either by right or leave of court. *Pritchard* v. *Reinfair*, 945 F.2d 185 (7th Cir. 1991).

There is no conflict of law or principles in the case at hand. Petitioner's complaint against the Cabinet is clearly barred by the Eleventh Amendment and the writ should be denied accordingly.

II. KRS 620.060(1) is Constitutional in Allowing an *Ex Parte* Emergency Custody Order to be Entered Without a Pre-Deprivation Hearing.

The post-deprivation hearing provided to Hoffman satisfied due process considering the state's interest in ensuring that the child would not be exposed to harm. Neither the Sixth Circuit nor the District Court reach the merits of the claim that KRS 620.060(1) is unconstitutional. Citing *Escambia County* v. *McMillan*, 466 U.S. 48, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (per curiam), on remand 748 F. 2d 1037 (5th Cir. 1984), the District Court held that because the case was decided on non-constitutional grounds, it should avoid deciding a constitutional issue. (Order and Judgment, Pet. A. p. 34a.) Notwithstanding the Courts'

sound reasoning in declining to address the constitutionality of KRS 620.060(1), the State Defendants affirmatively assert that: 1) Hoffman failed to plead and demonstrate that the post-deprivation hearing was inadequate; 2) Applying the factors in *Matthews* v. *Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Constitution does not require a hearing when it is necessary to protect a child from serious and imminent physical psychological or emotional harm; 3) Hoffman failed to demonstrate that a pre-deprivation hearing would have prevented the imposition of supervised visitation.

Hoffman omitted in his Complaint the fact that he was afforded a post-deprivation hearing and consequently, it was not alleged that the hearing was inadequate.

The due process prongs are set out in *Matthews* v. *Eldridge*, 424 U.S. at 335 (1976) and are as follows:

> First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and that fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Applying the *Matthews* factors to Hoffman's situation, it is evident that the post-deprivation hearing provided by KRS 620.080(1)(a) satisfied due process. The private interest affected by the *ex parte* order was the type of visitation Hoffman was to have with his child. Hoffman was to have supervised visitation instead of the previous unsupervised arrangement. Unsupervised visitation is not a federally protected constitutional claim. Pursuant to *Scrivner* v. *Andrews*, 816 F.2d 261 (6th Cir. 1987), parents have no enforceable right to "meaningful visitation."

The requirement of supervised visitation is not a "deprivation", and hence Hoffman did not have a "clearly established right". Therefore, the second prong of *Matthews* is not applicable.

As to the Government's interest, there is no contest when the desire of Hoffman to have unsupervised visitation is balanced against the government's interest in protecting a child from an alleged sexual abuser. Courts have recognized that the liberty interest in familial relations is limited by the compelling governmental interest in protecting minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves. *Fitzgerald* v. *Williamson*, 787 F.2d 403 (8th Cir. 1986); *Myers* v. *Morris*, 810 F.2d 1437 (8th Cir. 1987); *Newton* v. *Burgin*, 363 F.Supp. 782 (1973), *affirmed* 414 U.S. 1139 (1974).

KRS 620.060(1) is clearly constitutional and the writ should be denied.

III. The "Functional" Analysis of *Salyer* v. *Patrick*, Applies and Gives Absolute Immunity to a Social Worker who Filed an Affidavit Which Led to the Issuance of an Emergency Custody Order Pursuant to KRS 620.060(1).

While Petitioner agrees with the Court below that the Ninth and Sixth Circuits apply the "functional" approach, and that under *Salyer* v. *Patrick*, 874 F.2d 374 (6th Cir. 1989), the social workers in the case *sub judice* would be afforded absolute immunity, he contends that a writ should be granted to resolve a conflict between the other circuits.

The cases cited by Petitioner from various circuits in no way conflict with *Salyer*, or each other, nor would they change the result in this case. Petitioner's Complaint stated "[t]hat . . . at the behest of West and Defendant Hoffman, Harris testified by Affidavit or sworn testimony to the

Fayette District Court that [Ian Hoffman was allegedly sexually abusing a child.]" (Pet. A. p. 47a.).

The Plaintiffs in *Salyer* sued under 42 U.S.C. §1983, alleging that two social workers filed a juvenile court petition without adequately investigating a report that the child had been sexually abused. An emergency custody order was subsequently obtained. The Sixth Circuit held:

> It appears to this court that the family service workers were absolutely immune from liability in filing the juvenile abuse petition, due to their quasi-prosecutorial function in the initiation of child abuse proceedings. See *Meyers* v. *Contra Costa County Dep't of Social Services,* 812 F.2d 1154, 1157 (9th Cir. 1987) *cert. denied.* ___U.S. ___, 108 S.Ct. 98, 98 L.Ed.2d 59 (1987).
>
> *Id.* at 378.

The *Salyer* court held that the filing of a child abuse petition is an integral part of the judicial process because social services workers function as prosecutors in bringing the child before the juvenile court.

A reading of the cases cited by Petitioner reveals that except for the two Pre-*Salyer* district court cases of *Rinderer* v. *Delaware County Children and Youth Services,* 703 F. Supp. 358 (E.D. Pa. 1987) and *Czikalla* v. *Malloy,* 649 F.Supp. 1212 (D.C. Colo., 1986), the Circuit cases all recognize the "functional" approach to absolute immunity and in no way conflict with each other or the decision of the court below.

In *Spielman* v. *Hildebrand,* 873 F.2d 1377 (10th Cir. 1989), a case cited by the Petitioner, the Tenth Circuit carefully distinguished absolute from qualified immunity, stating that the test was

> whether the defendants' action in this case constituted advocacy functions sufficiently related to initiating judicial proceedings to justify absolute immunity. Some courts have utilized the analogy to prosecutorial functions to award absolute immunity to social workers performing the function of initiating dependency proceedings against parents suspected of child abuse. (Citations omitted).
>
> *Id.* at 1382.

It is obvious from review of petitioner's complaint that the accused actions of the social workers were directly related to advocacy before a judicial body.

As there is no conflict between the circuits and *Salyer* clearly applies, the writ should be denied.

IV. The Social Workers Were Entitled to Absolute Immunity as to Their Participation in an Abuse Action Filed in the Jurisdictionally Sound District Court.

Petitioner argues on page eighteen (18) of his petition that the social workers "went outside their investigatory duties to obtain an *ex parte* order from a Court which they should have known lacked the jurisdiction to issue." Although jurisdiction was not raised in Petitioner's complaint, he cites no factual or legal grounds in his petition for this assertion.

Under KRS 610.010(1) and (6) and KRS 620.010, jurisdiction for abuse proceedings and removal is with the District Court.

In addition, it is legally unsound and illogical to argue that the social workers' quasi-prosecutorial duties were somehow converted to and should be defined as investigatory functions if the District Court is deemed to have lacked jurisdiction over the action.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

COMMONWEALTH OF KENTUCKY
CABINET FOR HUMAN RESOURCES
ANGELA M. FORD
General Counsel
STANLEY A. STRATFORD
Deputy Counsel

By: Heather M. McKeever
HEATHER M. MCKEEVER
Counsel of Record
Department of Law
275 East Main Street, 4 W.
Frankfort, Kentucky 40621
Telephone: (502) 564-7900
Counsel for Respondents

SUPREME COURT OF THE UNITED STATES

IAN HOFFMAN *v.* TAMMY D. HARRIS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 93–1044. Decided April 25, 1994

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Petitioner Ian Hoffman brought suit under 42 U. S. C. §1983 against respondents, Kentucky's Cabinet for Human Resources (CHR), two CHR social workers, and his former wife, Melisa Hoffman, alleging that they had deprived him of a constitutionally protected liberty interest in being allowed to visit his minor daughter, B. H. The events giving rise to the suit began when Melisa told the social workers that she suspected petitioner of sexually abusing B. H. The social workers obtained an *ex parte* order from a state court that suspended petitioner's visitation rights. The District Court held that the social workers were absolutely immune from damages liability under §1983 for this conduct. Relying on its decision in *Salyer* v. *Patrick*, 874 F. 2d 374 (CA6 1989), the Court of Appeals affirmed. I would grant certiorari to address petitioner's challenge to that ruling.

In *Salyer*, the Sixth Circuit held that, "due to their quasi-prosecutorial function in the initiation of child abuse proceedings," social workers are absolutely immune from liability for filing juvenile abuse petitions. *Id.*, at 378. Other courts addressing the question have agreed that social workers are entitled to absolute immunity under §1983 in some instances, depending on their conduct and the terms of the state laws pursuant

to which they acted. See, *e. g.*, *Meyers* v. *Contra Costa County Dept. of Social Servs.*, 812 F. 2d 1154, 1157 (CA9) (holding that "social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings"), cert. denied, 484 U. S. 829 (1987); *Vosburg* v. *Department of Social Servs.*, 884 F. 2d 133 (CA4 1989) (granting absolute immunity to social workers in connection with their filing of a child removal petition in juvenile court); *Snell* v. *Tunnell*, 920 F. 2d 673 (CA10 1990) (denying absolute immunity to social workers for conduct in seeking a protective custody order that did not initiate juvenile court proceedings), cert. denied, 499 U. S. 976 (1991). These courts have reasoned that social workers function as prosecutors in certain contexts, and therefore are entitled to the absolute immunity that would be due a prosecutor performing analogous functions. Cf. *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (discussing prosecutorial immunity).

Consideration of the function performed by an official seeking absolute immunity plays an important role in our immunity analysis. See, *e. g.*, *Buckley* v. *Fitzsimmons*, 509 U. S. ___, ___ (1993) (slip op., at 9-10). Function, however, becomes significant only when evaluated in historical context. A related inquiry precedes the functional analysis: "Our *initial* inquiry is whether an official claiming immunity under §1983 can point to a common-law counterpart to the privilege he asserts." *Malley* v. *Briggs*, 475 U. S. 335, 339–340 (1986) (emphasis added). Although §1983 "on its face admits of no defense of official immunity," "[c]ertain immunities were so well established in 1871, when §1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley*, *supra*, at ___ (slip op., at 8) (quoting *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967)). We therefore have held that some officials are, under certain circumstances, entitled to absolute immunity.

See, *e. g.*, *Imbler*, *supra*. An official seeking such immunity, however, must at the outset show that a "counterpart to the privilege he asserts" was recognized at common law in 1871, for "[w]here we have found that a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under §1983." *Burns* v. *Reed*, 500 U. S. 478, 498 (1991) (SCALIA, J., concurring in judgment in part and dissenting in part).

The courts that have accorded absolute immunity to social workers appear to have overlooked the necessary historical inquiry; none has seriously considered whether social workers enjoyed absolute immunity for their official duties in 1871. If they did not, absolute immunity is unavailable to social workers under §1983. See *ibid.* This all assumes, of course, that "social workers" (at least as we now understand the term) even existed in 1871. If that assumption is false, the argument for granting absolute immunity becomes (at least) more difficult to maintain. Cf. *Antoine* v. *Byers & Anderson, Inc.*, 508 U. S. ___ (1993) (denying court reporter absolute immunity in large part because official court reporters did not begin appearing in state courts until the late 19th century).

It may be argued that the Sixth Circuit and other courts *have* effectively identified a common law counterpart to the modern social worker for purposes of the immunity analysis: the 1871 prosecutor. In reasoning that the social worker functions as a prosecutor in performing certain duties, these courts essentially have suggested that, by analogy, the historically-rooted immunity for prosecutors should apply to social workers. In the absence of a detailed examination of the immunity (if any) that applied to social workers in 1871, however, such an analogy must be suspect. But even putting historical concerns aside, it is not clear to me that the functional analysis of the Sixth Circuit is correct. I am not convinced that social workers, who often are involved in civil family welfare proceedings,

often are involved in civil family welfare proceedings, can ever function as prosecutors for purposes of §1983 immunity analysis. Cf. *Imbler*, *supra*, at 430 (absolute prosecutorial immunity extends to those functions "intimately associated with the judicial phase of the *criminal process*") (emphasis added).

Of course, the decision below and other decisions granting absolute immunity to social workers may be premised more on the notion that absolute immunity serves important policy concerns than on either historical or functional analyses. See, *e. g.*, *Meyers*, 812 F. 2d, at 1157. To the extent they are so based, they are misguided: The federal courts "do not have a license to establish immunities from §1983 actions in the interests of what [they] judge to be sound public policy." *Tower* v. *Glover*, 467 U. S. 914, 922–923 (1984).

We should address the important threshold question whether social workers are, under *any* circumstances, entitled to absolute immunity. Accordingly, I respectfully dissent.